IN THE

Supreme Court of The United States

October Term, 1951

NO. 1

GEORGIA RAILROAD & BANKING COMPANY,
Appellant,

VS.

CHARLES D. REDWINE, State Revenue Commissioner,
Appellee

BRIEF FOR APPELLANT

ROBERT B. TROUTMAN
FURMAN SMITH
Attorneys for Appellant

Spalding, Sibley, Troutman & Kelley
434 Trust Company of Georgia Bldg.
Atlanta, Georgia
of Counsel for Appellant.

INDEX

APPENDIX

APPENDIX—*Continued*

LIST OF AUTHORITIES CITED

LIST OF AUTHORITIES CITED—*Continued*

LIST OF AUTHORITIES CITED—*Continued*

LIST OF AUTHORITIES CITED—*Continued*

Constitutions Cited:

Statutes Cited:

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PRELIMINARY STATEMENT

In view of the developments since this case was argued in February 1950, appellant has rewritten its brief to include such developments. This brief supersedes the brief and reply brief previously filed by appellant.

OPINION OF COURT BELOW

The opinion of the District Court is reported in 85 Federal Supplement 749.

JURISDICTION OF THE SUPREME COURT

The jurisdiction of the Supreme Court is invoked under Title 28, U. S. Code, Sec. 1253, which provides for direct appeal to the Supreme Court from any action required to be heard and determined by a District Court of three Judges. The action is to enjoin the State Revenue Commissioner from collecting a tax from appellant on the grounds that the state statute under which such a tax is imposed is contrary to the Constitution of

the United States. Such action is required, by Title 28 U. S. Code, Sec. 2281, to be heard and determined by a District Court of three Judges, and was in fact heard and determined by a District Court of three Judges. Probable jurisdiction was noted December 5, 1949 (R. 195).

STATEMENT OF THE CASE

During the first part of the nineteenth century, the great problem of the State of Georgia was the development of inland transportation. The populated part of the State then consisted of a narrow strip along the seaboard and up the navigable rivers. It was universally believed that untold wealth lay in the interior, but the development of such wealth depended on the development of transportation. The State therefore undertook the building of canals and roads. It soon became apparent, however, that railroads were the proper answer to the problem. The State therefore turned all of its energies to the building of railroads. It employed an engineer to survey and plan railroads. It undertook the building of railroads with its own funds raised by the issuance of state bonds. In many other instances it subscribed to the stock in railroads. In a very large number of instances the bonds of railroad companies were guaranteed by the State, and in many such instances the State was required to make good on its guarantee. Cities were authorized to and did subscribe to stock of railroads or endorse their bonds.

In practically every case in which a railroad was built by private capital during this period the charter provided a contractual limitation on the power of the State to tax. There were about 30 charters containing such limitations. All but two have now been lost through merger or insolvency proceedings.

In 1832 the Charleston and Hamburg Railroad was built, under a charter granting tax exemption, from Charleston to Hamburg, S. C., opposite Augusta on the Savannah River. It was realized that this railroad would draw traffic away from Augusta and Savannah to Charleston unless similar transportation was provided by the State of Georgia.

Therefore, in 1833, Appellant, Georgia Railroad & Banking Company, was chartered by Special Act of the Legislature of Georgia approved December 21, 1833 (Georgia Laws of 1833, p. 256 et seq. App. i). That Act provided:

> "The stock of said company and its branches shall be exempt from taxation for and during the term of seven years from and after completion of said railroads or any one of them; and after that shall be subject to tax not exceeding one-half percent per annum on the net proceeds of their investment." (App. vi)

Both the Supreme Court of Georgia and this Court have held that that provision prevented the taxation, except as therein provided, of the lines and appurtenances of the railroad in which the capital stock was lawfully invested.

Prior litigation.

In 1874 the legislature of Georgia passed an act levying ad valorem taxes on railroads. Appellant resisted the tax. The Supreme Court of Georgia, in *State of Georgia v. Georgia Railroad & Banking Co.*, 54 Ga. 423, held that the above provision was an irrevocable contract exempting the property of the railroad from tax except as provided therein, and that the Act of 1874, as applied against appellant, was unconstitutional and void as impairing the obligation of that contract, contrary to Art. I, Section 10, of the Constitution of the United States.

No further effort was made to tax the property of the railroad until 1902 when the State of Georgia, acting through its Comptroller General, again attempted to levy a tax on the property of appellant. Appellant then brought suit in equity in the Circuit Court for the Northern District of Georgia against William A. Wright, Comptroller General of Georgia.

That action was defended by the Attorney General of Georgia with the approval and direction of the Governor. The Attorney General not only resisted the injunction but affirmatively asked the court to consider and decide the questions involved in order that the defendant as an official of the State

of Georgia might know and perform his official duty. (R. 79, 83)

The Court, after hearing, held that the charter provision was an irrevocable contract, preventing the taxation of the property of Appellant except as therein provided and entered a decree permanently enjoining the defendant from levying and collecting any tax against the property described in the decree except as provided in the Charter (R. 84).

Georgia Railroad & Banking Co. v. Wright,
132 Fed. 912.

On appeal, this Court modified the decree by striking therefrom certain property which had been acquired by the railroad in a subsequent merger and affirmed the decree as so modified. (R. 131)

Wright v. Georgia Railroad & Banking Co.,
216 U. S. 420.

The state then attempted to levy a tax against the property in the hands of the lessees. That attempt was also enjoined; and this Court, on appeal, affirmed.

Wright v. Louisville & Nashville Railroad Co.,
236 U. S. 687.

Constitution of 1945

Thereafter no efforts were made to tax the Railroad until 1945. At that time the State of Georgia adopted an amendment to its Constitution providing:

> "All exemptions from taxation heretofore granted in corporate charters are declared to be henceforth null and void." (App. xxxiv)

Acting under that section, the State Revenue Commissioner threatened to levy and collect taxes against the property of Appellant from 1939 to date.

Appellant brought suit in the Superior Court of Fulton County, Georgia, against the State Revenue Commissioner for

declaratory judgment and to enjoin the threatened levy and collection, which seemed to Appellant the clearest remedy under the Georgia law. The Superior Court decided in favor of the Railroad and the Commissioner appealed. The Supreme Court of Georgia held that the remedy was not available to Appellant and ordered the action dismissed on that ground without intimating any opinion on the merits. The Supreme Court of Georgia expressly refused to intimate an opinion on what remedy, if any, was available to Appellant in the Courts of Georgia, although requested to do so. *Musgrove v. Georgia Railroad & Banking Co.*, 204 Ga. 139. This Court dismissed an appeal on the ground that the judgment of the Supreme Court of Georgia was based upon a non-federal ground adequate to support it. *Georgia Railroad & Banking Co., v. Musgrove*, 335 U. S. 900.

There being no apparent remedy in the courts of Georgia, Appellant then brought suit in the District Court of the United States for the Northern District of Georgia against the State Revenue Commissioner, to enjoin the threatened levy and collection on the grounds that the threatened action would impair the obligation of the contract and would deprive Appellant of its property without due process of law. The complaint further prayed that the prior final decree of the federal court, as modified and affirmed by this Court, be enforced.

A three-Judge Court was convened as provided in Sec. 2281 and Sec. 2284 of the Judicial Code. Appellee filed motion to dismiss (R. 9, 15). Appellant filed motion for judgment on the pleading, or for a summary judgment, or in the alternative for an interlocutory injunction (R. 161).

Judgment of District Court.

The three-judge court, after argument, sustained the motion to dismiss on the ground that the action was against the State of Georgia within the prohibition of the 11th Amendment of the Constitution of the United States. (R. 170) One Judge dissented on the grounds that the Court had jurisdiction to enforce its prior degree and that all questions presented were precluded by the prior decree. (R. 180)

Proceedings in this Court.

In the oral argument before this Court on February 13, 1950, counsel for appellee said that the judgment of dismissal should be affirmed because there was a plain, speedy and efficient remedy available to Appellant in the courts of Georgia. The Court asked counsel what such remedy was. He replied that such remedy was by appeal from the assessment of the State Revenue Commissioner to the proper Superior Court of Georgia. Appellant, on the other hand, insisted that such remedy was not available to Appellant, or if it were it certainly was not "plain".

This Court, on February 20, 1950, entered the following order:

> "Per Curiam: Inasmuch as the Attorney General of Georgia stated at the bar of this Court that plain, speedy and efficient state remedies were available to appellant, the cause is ordered continued for such period as will enable appellant with all convenient speed to assert such remedies."

In obedience to that mandate Appellant, with all convenient speed, took an appeal from the assessment of the State Revenue Commissioner to the Superior Court of Richmond County, Georgia, and thence to the Supreme Court of Georgia.

The Supreme Court of Georgia, on its own motion, held that the remedy of appeal was not available to Appellant and ordered the case dismissed for want of jurisdiction. Three of the Judges dissented on this point, stating that since there was no other remedy available to Appellant under the law of Georgia they would not impute to the legislature an intent to deny Appellant all remedy but would construe the Act of 1943 as not withdrawing such remedy. One of the Judges stated that he would decide the case on its merits in favor of Appellant. The other Justices said that, since the case was ordered dismissed for want of jurisdiction, they would not intimate any opinion on the merits. *Georgia Railroad & Banking Co. v. Redwine*, 66 S. E. (2d) 234.

Having fully, and fruitlessly, complied with the mandate of this Court of February 20, 1950, Appellant has moved the Court to terminate the continuance and to decide the case.

SPECIFICATION OF ERRORS

The court below erred in dismissing the petition, and in not entering a summary judgment or a judgment on the pleadings in favor of appellant, for the reasons that (a) the action was not against the state, (b) the court had jurisdiction to enforce its prior final decree and permanent injunction affirmed by this Court, (c) appellee was concluded by the prior final decree affirmed by this Court, (d) the taxes sought to be collected and the statutes under which they were imposed are contrary to Sec. 10 of Article I of the Constitution of the United States in that they would impair the obligation of the contract, and (e) the dismissal of the complaint, unless reversed, will result in appellant's being deprived of its property without any opportunity for a hearing and without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, as is more fully set out in the assignments of error I through 9 (R. 191).

SUMMARY OF ARGUMENT

An action to enjoin the collection of a state tax on the grounds that the law of the state under which the tax is levied is contrary to the Constitution of the United States is not an action against the state within the meaning of the Eleventh Amendment. This Court has repeatedly so held. This Court has so held in the precise situation here presented, that is, in an action to enjoin the tax on the grounds that the law levying the tax impairs a contract of the state contrary to the Constitution of the United States. *Allen v. B. & O. Railroad*, 114 U. S. 311.

Appellee admits that the statute as construed by the Supreme Court of Georgia deprives Appellant of its property without due process of law because the Georgia statute provides no remedy for contesting the taxability of the property. This

Court has repeatedly held that an action to enjoin a state official from enforcing a state statute on the grounds that such statute deprives the complainant of property without due process of law is not a suit against the State within the prohibition of the Eleventh Amendment.

Moreover, the complaint also prays that the former final decree as modified and affirmed by this Court be carried out and enforced. This Court has held that where, as was the case in the prior litigation in the Federal Court, the State through its duly authorized officials, to protect its interest, assumes the defense of the action against one of its officials and asks affirmative relief of the Federal Court, the State and its subsequent officials are bound by the final decree, and the Federal Court has ancillary jurisdiction to enforce such decree against any subsequent official of the State. *Gunter v. Atlantic Coast Line Railroad*, 200 U. S. 273.

Moreover, the greater portion of the asserted tax is claimed by the several counties and cities. Appellee is acting in their behalf in seeking to collect such tax, just as he is purporting to act on behalf of the State in collecting the part of the tax claimed by the State. If the suit is against the State in regard to the tax claimed by the State, then equally it is against the cities and counties in regard to the tax claimed by them.

The cities and counties have no immunity from suit; and the Court has jurisdiction to enjoin at least the collection of the tax claimed by them.

The officer enjoined by the prior decree was also attempting to collect tax for the cities and counties. The prior decree specifically enjoined the collection of any county or municipal tax contrary to the decree. Both this Court and the Supreme Court of Georgia have decided that a decree against an officer acting on behalf of a city or county is binding against subsequent officials acting in the same capacity.

One of the counties involved, Taliaferro County, formally intervened in the prior action, and was by order made a formal party, and participated in the appeal to this Court. It

certainly is bound by the prior decree, and the District Court certainly has ancillary jurisdiction to enforce that decree against Taliaferro County and against any person attempting to collect on behalf of Taliaferro County the tax enjoined by the prior decree.

The prior decree is conclusive on the validity and effect of the contract of exemption, not only as against the arguments there made against it, but on all arguments that could have been there urged against it.

The prior judgment of the Supreme Court of Georgia in *State of Georgia v. Georgia Railroad & Banking Co.*, 54 Ga. 423, is also res judicata and conclusive on the validity and effect of the contract of exemption.

Even if those decisions were not res judicata, they, and the many other decisions of this Court and of the Supreme Court of Georgia, should be followed as stare decisis.

The reasons urged by appellee against the validity of the contract are not well founded, even if the questions had not been decided.

Therefore, the District Court should have not only overruled the motion to dismiss, but should have granted Appellant's motion for a summary judgment or a judgment on the pleadings.

BRIEF OF LAW AND ARGUMENT

Action Is Not Against the State.

This Court has repeatedly held that an action to enjoin state officials from collecting a tax on the grounds that the tax is contrary to the Constitution of the United States is not an action against the state within the meaning of he eleventh amendment.

Looney v. Crane Co.,
245 U. S. 178, and cases there cited

This Court has held specifically that the action is not against the state where the injunction is sought on the grounds that

the threatened action would impair the obligation of a contract to which the state is a party.

Allen v. B & O Railroad,
114 U. S. 311.

Gunter v. Atlantic Coast Line R. R.,
200 U. S. 273.

Board of Liquidation v. McComb,
92 U. S. 531.

This Court has in many other cases affirmed injunctions against state officials enjoining them from collecting taxes from a railroad company on the grounds that such action would impair a contract of exemption entered into by the state, both the parties and the court considering the question too well settled to require discussion.

Wright v. Georgia Railroad & Banking Co.,
216 U. S. 420.

Wright v. L & N Railroad,
236 U. S. 687.

Wright v. Central of Georgia Railroad,
236 U. S. 674.

Powers v. Detroit & Grand Haven Railway,
201 U. S. 543.

Wright v. Sills,
2 Black 544.

Humphrey v. Pegues,
16 Wall 244.

Tomlinson v. Branch,
15 Wall 460.

Dodge v. Woolsey,
18 Howard 331.

This Court has recently, in *Larson v. Domestic and Foreign Commerce Corp.*, 337 U. S. 682, reviewed the cases and restated the rule in regard to suits against the sovereign (p. 689):

". . . where the officers' powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do. Or he is doing it in a way which the sovereign has forbidden. His actions are ultra vires his authority and, therefore, may be made the object of specific relief . . .

"A second type of case is that in which the statute or order conferring power upon the officer to take action in the sovereign's name is claimed to be unconstitutional. Actions for habeas corpus against the warden and injunctions against the threatened enforcement of unconstitutional statutes are familiar examples of this type. Here, too, the conduct against which specific relief is sought is beyond the officer's power and is, therefore, not the conduct of the sovereign. The only difference is that in this case the power has been conferred in form but the grant is lacking in substance because of its constitutional invalidity.

". . . the action of an officer of a sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so 'illegal' as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory power or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void." (p. 701)

This rule is elaborated and the cases collected in the excellent dissenting opinion of Mr. Justice Frankfurter, concurred in by Mr. Justice Burton (337 U. S. 705). The distinction is there made crystal clear between the cases in which the plaintiff merely seeks to enjoin the State official from taking unconstitutional action, and those cases in which the plaintiff seeks to require the officer to set in motion the machinery of government, or to require the transfer of money or property belonging

to the State. In the former the action may be maintained; in the latter it may not.

The rule laid down by his Court in the *Larson* case is well illustrated by a comparison of *Allen v. B & O Railroad Co.*, 114 U. S. 311, and *In re Ayers*, 123 U. S. 443, both opinions written by the same Justice and involving the same contract.

In the *Allen* case the State of Virginia had issued bonds providing that coupons would be receivable in payment of all taxes. Subsequently the state attempted to repudiate its contract. The railroad had tendered coupons in payment of tax. Notwithstanding the tender, and in violation of the contract, the state official attempted to enforce the taxes. The railroad brought action in the federal court to enjoin the collection of the taxes. This Court held that the action was not against the state and that the injunction was properly granted.

In the *Ayers* case, the State of Virginia had passed a law directing the Attorney General to bring action in the State Court against taxpayers who had tendered the coupon in payment of taxes to recover such taxes and to require the taxpayers in such cases to prove that the coupons were genuine and not spurious. The plaintiff in that case was a resident of England who had bought coupons for resale at a profit. No effort had been made to collect any taxes from him or to disturb his property in any way. He brought an action in the federal court, alleging that the action of the Attorney General made his coupons less desirable and depreciated their value, and praying that the Attorney General be enjoined from instituting any action in the name of the State of Virginia and be required to dismiss such actions which he had already brought. Clearly that suit sought to control the action of the Attorney General in his official capacity and not as an individual acting beyond his authority. Bringing or dismissing an action in the name of the state was, of course, an offical act within the scope of his authority, whether such actions were well founded or not. This Court, therefore, held that the action was in effect against the state and could not be maintained.

This action clearly falls within the ambit of the *Allen, Gunter*

and similar cases. Appellant does not ask that appellee be required to do any act in his official capacity. It does not seek to impair or interfere with any funds or property of the State. It is entirely defensive in purpose and effect. It merely prays that appellee be enjoined from seizing the property of Appellant under a state statute which is, as to Appellant, clearly unconstitutional. Since the State statute purporting to authorize appellee to seize Appellant's property is unconstitutional, appellee has not been validly authorized by the State of Georgia to seize Appellant's property and appellee is, therefore, acting as an individual wrongdoer and not as a representative of the State in such threatened seizure.

Appellant has been denied due process of law.

Moreover, the complaint also sought to enjoin the levy and collection of the tax on the grounds that Appellant was threatened with a deprivation of its property without due process of law. Appellee has solemnly admitted in judicio that the Georgia statutes, as now construed by the Supreme Court of Georgia, do deny due process of law. In his motion for rehearing to the Supreme Court of Georgia, he said:

> "In deciding sua sponte that the Act of 1943, supra, took away the only available method open to the Railroad to review judicially the question of its taxability ad valorem, the court overlooked and failed to decide, as movant insists it should have done, whether the Act of 1943 was in this respect unconstitutional as denying to the Railroad due process of law in violation of the Fourteenth Amendment to the Federal Constitution and that of the State Constitution, Art. I, Sec. I, Par. III (Code Sec. 2-103)."

And in his brief in support of that motion he said:

> "The construction placed upon the Act of 1943 takes away from the Railroad the only remaining method for judicial determination of questions of taxability. Therefore, if the meaning of the Act of 1943 is correctly construed it is to that extent unconstitutional as violating the due process

clause of the Fourteenth Amendment to the Federal Constitution and of Article I, Sec. I, Paragraph III of the Constitution of Georgia."

This Court has decided that "the assessment of a tax is action judicial in its nature requiring for the legal exertion of the power such opportunity to appear and to be heard as the circumstances of the case require" and "that due process of law requires that after such notice as may be appropriate, the taxpayer have opportunity to be heard as to the validity of the tax." *Central of Georgia Railway v. Wright*, 207 U. S. 127; *Turner v. Wade*, 254 U. S. 64. The failure of the State to provide a judicial remedy renders the State exaction unconstitutional and void, and the Federal Court will enjoin on that ground. *Oklahoma Operating Co. v. Love*, 252 U. S. 331; *Ex Parte Young*, 209 U. S. 123.

This Court has held in innumerable cases,[1] and the principle was reaffirmed as recently as *Alabama Public Service Co. v. Southern Ry. Co.*, 341 U. S. , 71 S. Ct. 762, Note 4, decided May 21, 1951, that the Eleventh Amendment does not prevent a suit to enjoin a state official from enforcing a state statute on the grounds that such statute or the threatened action thereunder would deprive the complainant of property without due process of law.

The Court has ancillary jurisdiction to enforce its own prior decree.

Moreover, this Court held, in *Gunter v. Atlantic Coast Line Railroad*, 200 U. S. 273, that where suit is brought against a state official to enjoin the collection of a tax, and the State, through its duly authorized officers, to protect and enforce the rights of the State, undertook the defense of the suit, the State was bound by the decree as fully as if it had been a party to the record and that the Federal District Court which rendered the decree had ancillary jurisdiction to enforce such decree against the subsequent officials of the State. In that

[1] See the cases collected in Note 3, 337 U. S. 710.

case a stockholder of the railroad had previously brought suit in the federal court to enjoin a County Treasurer from collecting tax from the railroad on the ground that the property was exempt from tax under a contractual exemption in its charter. The Attorney General of South Carolina, as authorized by South Carolina law, undertook the defense of the suit. A final decree and injunction was entered. Some thirty years later the State of South Carolina passed a law requiring the property to be taxed and directing the Attorney General to bring action to enforce the tax. The railroad then filed ancillary proceedings in the same cause asking the court to enforce its prior decree by restraining the Attorney General from prosecuting the action. The court did enjoin the Attorney General and this Court affirmed, holding: (1) that since the state, through its duly authorized officer, had undertaken the defense of the prior action, it and its subsequent subordinate officials were bound by the prior decree and injunction; (2) that the District Court, therefore, had ancillary jurisdiction to enforce that decree and injunction against the state and against all subsequent officials of the state, and (3) that the prior decree conclusively adjudicated that the contract of exemption was valid, not only as against all objections here urged, bu as against all objections that could have been there urged.

This is but an application of the settled principle that a judgment is binding not only as against parties to the record but also against any person interested who employs counsel or otherwise openly defends the action.

> "One who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly to the knowledge of the opposing party, is as much bound by the judgment and as fully entitled to avail himself of it as an estoppel against the adverse party as he would be if he had been a party to the record."
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> *Souffront v. Campagne des Secreries,*
> 217 U. S. 475, 487.

This principle is equally as applicable to the sovereign.

"If the United States in fact employs counsel to represent interest in a litigation or otherwise actively aids in its conduct, it is properly enough deemed to be a party and not a stranger to the litigation and bound by its result."

Drummond v. United States,
324 U. S. 316, 318.

The District Court in its opinion distinguishes the *Gunter* case on the grounds that the Attorney General of Georgia was not authorized to represent Wright in the prior action or to file answers in his behalf, but exceeded his authority. This requires a consideration of the provisions of the laws of Georgia then in force. These are set out in the appendix, page xxxiv et seq.

The Code of 1895, then in force, provided:

"It is in the discretion of the Comptroller General to require the Attorney General, when the services of a Solicitor General are necessary in collecting or securing any claim of the State, in any part of the State; either to command the services of said Attorney General in any and all such cases, or the Solicitor Generals in their respective circuits."

Sec. 222, Code of 1895.

"It shall be the duty of the Attorney General . . . to represent the State . . . in all civil and criminal cases in any court when required by the Governor."

Sec. 220, Code of 1895.

"When any suit is instituted against the State *or against any person, in the result of which the State has an interest* under pretense of any claim inconsistent with its sovereignty, jurisdiction or right, the Governor *shall*, in his discretion, provide for the defense of such suit unless otherwise specially provided for."

Sec. 23, Code of 1895.

The Attorney General, in his official capacity, acknowledged service (R. 41) and filed answers for the Comptroller General (R. 75, 81). His answer not only defends Wright personally, but affirmatively "prays the court, since it now has jurisdiction of this entire case, in order that respondent may properly exercise his duty in the premises as Comptroller General, that this Court will construe Section 15 of the charter of complainant, or so much thereof as relates to the subject of taxation," (R. 80) and further "that said Section should be construed, and if found to protect any of the present property of complainant from property taxation, defendant should be adjudged free to assess and tax such property and values as are not so protected, from year to year, under such machinery as is by the laws provided." (R. 83)

There can be no doubt that the Comptroller General considered the services of the Attorney General "necessary in collecting or securing the claim of the State" and "commanded the services of the Attorney General." Nor can there be any doubt that the submission of the issue to the Federal Court was with the full knowledge and approval of both the Governor and the legislature. Governor Hoke Smith, in his message to the legislature in 1908, said that there was then pending the case between Appellant "and *the State*, in which I hope a decision will be rendered which will define the State's right to collect taxes from it." He then detailed at some length the contentions of "the State."[1] In 1913 the legislature passed a

[1] "Litigation has been pending, off and on, for years between *the State* and the Georgia Railroad and Banking Company, growing out of a provision in its original charter upon the subject of taxation. There will probably be heard this Fall before the Supreme Court of the United States the case between that Company and *the State, in which I hope a decision may be rendered which will define the State's right to collect taxes from it.*

"*The State* says:

"First, that a correct construction of the original charter of the Georgia Railroad and Banking Company exempted only the stock of the Company from taxation.

"Second, that if this view is not sound, still the investment other than the original capital is subject to taxation. Success even to this extent would subject $9,000,000 of property belonging to this Company to taxation.

"We should seek no injustice to railroad companies, but they ought to bear part of the burdens of government. They ought not to be relieved from taxation, leaving thereby extra burdens upon the private citizens, unless clearly exempt by contract binding upon the State."

House Journal for 1908, pp. 24-25.

resolution reciting that John C. Hart, counsel for defendant in the prior litigation, was "under contract with *the State of Georgia* to represent the State in certain suits for taxes brought against several railroad corporations of this State, his compensation being conditional on recovery,"[1] and that he had been appointed Tax Commissioner, and resolving that his acceptance would not affect that contract. That contract obviously referred to the litigation against this Appellant and other railroads similarly situated, which was then proceeding against the lessees in an effort to tax the property in their hands. *Wright v. L & N Railroad Co.*, 236 U. S. 687.

The Georgia Courts have held that when the Attorney General takes legal action, it will be presumed that he was authorized to do so by the Governor. *Alexander v. State*, 56 Ga. 479. The Georgia courts have further held that when the Attorney General assumes the defense and files an answer in an action to enjoin the collection of a claim of the State, the State becomes for all practical purposes a party to the action. *Mayo v. Renfroe*, 66 Ga. 408. In that case the plaintiff brought suit to enjoin the sheriff from collecting an execution issued by the Governor for money due the State. The action was defended by the Attorney General. The objection was made that the

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[1]WHEREAS, it is announced that the Honorable John C. Hart of the County of Greene will be appointed by His Excellency, the Governor, Tax Commissioner of this State in accordance with an Act this day approved, and that the said John C. Hart has signified his willingness to accept said appointment, and

WHEREAS, The said John C. Hart is *now under contract with the State of Georgia to represent the State in certain suits for taxes brought against several railroad corporations of this State*, his compensation being conditional upon recovery, and,

WHEREAS, His duties as Tax Commissioner would in no wise conflict with his performance of his part of the contract or contracts aforesaid, it is,

Resolved by the General Assembly of Georgia, That it is the sense of the General Assembly that the acceptance on the part of the Honorable John C. Hart of the office of Tax Commissioner of this State and his performance of the duties of said office should and will conflict in no wise with any contracts existing between the said John C. Hart as attorney, and the State of Georgia; and,

Further, That the appointment of the said John C. Hart to the office aforesaid and his acceptance of same will not and should not nullify or void the future operation of said contracts.

Approved August 16, 1913.

Georgia Laws 1913, page 1306.

State or the Governor was an indispensible party. The court held that since the action was defended by the Attorney General the State was for all practical purposes a party.

> "Besides it is made his [the Governor's] duty to defend suits against any person where the state is interested. Code Sec. 22, 74; and this has been done in this case—the attorney general filed the demurrer for the sheriff, and the governor is in through his legal adviser and representative for all practical purposes, and in the only way in which he could well appear for the state." *Mayo v. Renfroe*, 66 Ga. 408, 427.

It is not necessary to argue, as appellee seems to think, that the Governor or the Attorney General would have had authority to consent to a suit avowedly against the State, such as a suit seeking a money judgment against the State. There is, we submit, a clear distinction between a suit in which the plaintiff is attempting to recover money or property from the State, in which the position of the State is purely defensive, such as *Ford Motor Co. v. Department of Treasury*, 323 U. S. 459, and a case, such as this, where the State is seeking to collect a claim from the other party and the other party is merely defending himself against an unconstitutional exaction.

It is Appellant's position that when a suit is brought to enjoin a State official from seizing property to collect an unconstitutional claim of the State, the State may, if it desires, leave the officer to fend for himself. In such case the judgment will be against the officer personally and the State may not be bound. But the State, may, for the purpose of enforcing its claim, intervene, assume the defense and ask the court to decide the issue in order that it may collect its claim. In that case the judgment is binding in favor of or against the State as fully as if it had brought the suit to collect the claim.

It will not be denied, we assume, that the Governor and the Attorney General were authorized to bring suit on behalf of the State to enforce a claim of the State. *Alexander v. State*, 56 Ga. 479; *Trust Company of Georgia v. State of Georgia*, 109 Ga. 736. No reason appears why they could not intervene and assume the defense of a pending suit and ask that the issue

be decided in that case, in lieu of bringing an independent suit. The State is equally bound in either case. *Gardner v. New Jersey*, 329 U. S. 565; *Clark v. Barnard*, 108 U. S. 436. In the *Gardner* case the Comptroller of the State of New Jersey filed, in a reorganization proceeding of a railroad, a claim for taxes claimed to be due the State from the railroad. The trustee filed objection to the taxes on various grounds. The State then attempted to withdraw its claim, contending that the objections filed by the trustee were in effect a suit against the State. This Court overruled the objection, saying:

> "The State is seeking something from the debtor. No judgment is sought against the State."

So in this case, the State is seeking to collect taxes from Appellant. Appellant is seeking nothing from the State.

In that case the state statute merely authorized the state Comptroller "to institute and direct prosecution . . . for just claims and debts due the state" and the Attorney General to "attend generally to all matters in which the state is a party or in which its rights and interests are involved." This Court held that such authorization was sufficient to authorize them to submit the claim of the State to the Federal Court so as to be bound by the judgment therein. Surely the statutes of the State of Georgia are broader and more explicit than the state statutes involved in that case.

In this case the Governor and the Attorney General were specifically authorized, and in fact required, to assume the defense of the prior action in order to protect and enforce the claim of the State. Sec. 23 of the Code of 1895 expressly requires the Governor, when any suit is brought against any person in which the State has an interest in protecting a claim of the State, to provide for the defense of such suit, and Sec. 220 requires the Attorney General to represent the interest of the State in any court when required by the Governor.

Most of the tax sought to be enjoined is city and county tax.

More than 85% of the tax sought to be enjoined in this case

was levied by and is payable to the several cities and counties. Under the Georgia law, the governing bodies of the cities and counties fix the rate and levy the tax on all property within their jurisdiction. They then inform the State Revenue Commissioner of the rate of tax so levied. He values the property of railroad companies within each city and county and applies the rate of tax fixed by such city and county to the value determined by him. The tax thus determined is payable to the local tax collectors. If the railroad fails to pay the tax the State Revenue Commissioner issues an execution which is then turned over to the local sheriff for levy. *Ga. Code of 1933*, Sec. 2702, 2703, 2704, 2705, App. xxiii-xxiv.

The State Revenue Commissioner thus acts on behalf of the several cities and counties in regard to the city and county taxes in exactly the same manner as he acts on behalf of the State in regard to the state taxes.

If a suit to prevent the official from assessing the tax levied by the State can be said to be a suit against the State, then it follows that the suit, as far as it seeks to enjoin the assessment of the tax on behalf of the cities and counties, is equally a suit against such cities and counties.

Cities and counties have no constitutional immunity from suit. *Lincoln County v. Luning*, 133 U. S. 529; *Chicot County v. Sherwood*, 148 U. S. 529. Where a public officer or agency is acting both on behalf of the State and of a municipal corporation, the Court has jurisdiction to grant full relief insofar as it affects the rights or claims of the municipal corporation, even though the Court would be without power to require affirmative action in regard to the rights or property of the State. *Hopkins v. Clemson College*, 221 U. S. 631; *Port of Seattle v. Oregon & W. R. R.*, 255 U. S. 56.

Therefore, the Court certainly has jurisdiction and the suit should proceed for the purpose of enjoining the assessment of the tax claimed by the cities and counties.

William A. Wright, the Comptroller General who was defendant in the prior action in the Federal Court, acted on behalf

of the cities and counties in precisely the same capacity as appellee is now acting. Appellee is in all respects the successor in office of Wright in regard to the assessment of ad valorem taxes against railroads.

The prior final decree, affirmed by this Court, expressly enjoined the levy and collection of any "county or municipal tax" not in accordance with that decree (R. 132).

Regardless of the uncertainty that may exist as to the extent to which a suit against a person purporting to act on behalf of a state is binding on his successor in office, because of constitutional limitations, there is no such uncertainty in regard to a decree against a person acting on behalf of a city or county. In such case both this Court and the Supreme Court of Georgia have held that the successors in office of such person are equally bound by the decree. *New Orleans v. Citizens Bank*, 167 U. S. 371, 388; *Thompson v. U. S.*, 103 U. S. 480; *Maddox v. Lithonia Banking Co.*, 166 Ga. 616; *Coleman v. Fields*, 142 Ga. 205.

Therefore, the cities and counties, which levied more than 85% of the tax sought to be enjoined, are clearly bound by the prior decree and the Court clearly has jurisdiction to enforce that decree as against the city and county taxes, regardless of whether the State of Georgia is bound thereby.

Court certainly has jurisdiction to enjoin tax claimed by Taliaferro County.

Moreover, one of the counties which is seeking to levy a tax against Appellant—Taliaferro County—employed counsel[1] and formally intervened in the prior action and was by order of Court made a formal party of record. It filed defensive pleadings and participated in the appeal to this Court (R. 61-72). Certainly Taliaferro County is barred and concluded by the decree; and the District Court certainly has jurisdiction to enforce its prior decree against Taliaferro County.

[1]Counsel for Taliaferro County was Hon. Samuel Sibley, later Chief Judge of the Court of Appeals for the Fifth Circuit, now retired.

Prior decree conclusive on all contentions.

A final decree upholding and enforcing a contract of exemption is conclusive on the validity and effect of the contract not only against the contentions urged against it but against all contentions that could have been urged against it. In such case the Court must necessarily decide (1) that the contract is valid, and (2) that it applies to the property sought to be taxed. It is of course settled that a judgment is conclusive on the issues which were necessarily decided in order to enter the judgment. In short, the "issue"—the "matter decided"—is the validity of the contract and not the arguments pro and con on its validity. *Gunter v. Atlantic Coast Line*, 200 U. S. 273; *Deposit Bank v. Frankfort*, 191 U. S. 499; *New Orleans v. Citizens Bank*, 167 U. S. 371.

Prior judgment of the Supreme Court of Georgia is res judicata.

The judgment of the Supreme Court of Georgia in *State of Georgia v. Georgia Railroad & Banking Co.*, 54 Ga. 423, is also res judicata on the validity and effect of the contract of exemption. In that case the State issued and levied an execution on the property of the Railroad for taxes claimed to be due. The Railroad filed affidavit of illegality, the remedy then provided by statute, on the grounds that the provision of its charter was an irrevocable contract preventing the taxation of its property except as therein provided and that such contract could not be impaired by any subsequent statute of the State of Georgia. The Supreme Court of Georgia held, in a unanimous opinion, that the provision of the charter was an irrevocable contract, that the legislature was authorized to grant such contract, that it had not been lost or impaired by any subsequent act, and that such contract could not be impaired under the Constitution of the United States.

In order to decide that case in favor of Appellant, the Supreme Court of Georgia necessarily had to decide, and did decide, (1) that plaintiff had a valid irrevocable contract, (2)

that such contract prevented the taxation of the property sought to be taxed, and (3) that such contract could not be impaired by any statute of Georgia under the Constitution of the United States. Appellant submits that that decision is res judicata and controlling on the points so decided, not only on the arguments there made but on the arguments that could have been there made on that issue.

Appellant recognizes that the effect to be given to a judgment of the State Court is determined by the state law, and that the Federal Courts will give no more effect to a State Court judgment than is given to such judgment in the State Court. Appellee contends that under the law of Georgia a judgment in regard to one year's taxes can never be res judicata in regard to another year's taxes, even on the precise points necessarily and actually decided. That contention has been ruled against appellee in *Coleman v. Fields*, 142 Ga. 205.

Appellee relies for his contention on *Georgia Railroad & Banking Company v. Wright*, 124 Ga. 596. In that case the judgment pleaded as res judicata was not a prior judgment of the State Court but was a prior judgment of the Supreme Court of the United States. There the Railroad had previously brought suit in the Federal Court to enjoin the levy and collection of a tax on stock owned by the Railroad in the Western Railroad of Alabama, on the ground that such stock was within the contract of exemption. This Court held that such stock was not within the contract of exemption. That was the only point decided by this Court. Thereafter the Railroad brought an action in the State Court to enjoin the tax on the stock for a later year, not on the grounds of the contract of exemption, but on the grounds that the State was systematically discriminating against the Railroad in not taxing other similar property and on other grounds having no relation to the contract of exemption. The Supreme Court of Georgia properly held that the prior decision of this Court, holding only that the stock was not within the contract of exemption, was not res judicata on a subsequent action resisting the tax for a different year on a wholly different reason.

Such holding was obviously sound. For example, if the Appellant should lose this case on its merits, it would be barred from thereafter contending that the property was exempt from tax under its charter, but surely it would not be forever barred in all subsequent years from resisting any tax the State might see fit to impose, on the ground that its property was being over-valued, or on the grounds that its property was being systematically valued higher than other similar property, or on any other grounds not related to the contract of exemption. That was all the Supreme Court of Georgia held in the *124th Georgia*.

The prior decree pleaded as res judicata in that case was a decree of the Federal Court affirmed by this Court. The Supreme Court of Georgia very properly recognized that the effect to be given to such decree was governed by the decisions of this Court and cited and relied on the decisions of this Court, which it quoted as follows:

> "'The two suits are for distinct and separate causes of action. *If there were any distinct question litigated and settled in the prior suit, the decision of the court upon that question might raise an estoppel in another suit* upon the principle stated in Cromwell v. County of Sac, 94 U. S. 351. But, as was held in that case, where the second action between the same parties is upon a different claim or demand, *the judgment in the prior action operates as an estoppel only as to those matter in issue or points controverted*, upon the determination of which the finding or verdict was rendered.'" (*Georgia Railroad & Banking Co. v. Wright*, 124 Ga. 596, 604.)

That quotation makes it clear that the Supreme Court of Georgia considered that the prior decree was res judicata in subsequent years on the issue of the validity and effect of the contract of exemption, actually made and decided in the prior action. That is clear from the above quotation, and is even clearer by reference to the other contemporaneous controlling decisions of this Court on the exact point. *Deposit Bank v. Frankfort*, 191 U. S. 499, 513; *Gunter v. Atlantic Coast Line*,

200 U. S. 273, 290; *New Orleans v. Citizens Bank*, 167 U. S. 371.

Moreover, the Supreme Court of Georgia in the subsequent case of *Coleman v. Fields*, 142 Ga. 205, specifically held that a judgment on the right to tax was res judicata in regard to subsequent years' taxes involving the same right to tax. In that case the taxpayer brought an action to enjoin the Board of Education from levying a tax on the grounds that the election authorizing the tax was void. He later brought an action to enjoin the sheriff from collecting the tax for a subsequent year. The Supreme Court of Georgia held that the judgment in the first case was res judicata and precluded a reexamination of the issues, saying:

> "It was contended that the suit to enjoin the levy of the tax related merely to the tax for one year, while the suit to enjoin collection of the tax related to taxes for another year, and on that account the subject-matters of the suits were different and the former judgment would not be conclusive; citing Georgia Railroad & Banking Co. v. Wright, 124 Ga. 596 (53 S E.. 251); 28 Cyc. 1182(b); Keokuk &C. R. Co. v. Missouri, 152 U. S. 301 (14 Sup. Ct. 592, 38 L. Ed. 450); Davenport v. Rock Island R. Co., 38 Iowa, 633-40. But this takes an unduly restricted view of the scope of the judgment in the former case. While in the first suit it was prayed that the officers be enjoined from levying the tax, the scope of the action was broader, and sought a decree declaring the election and the law void, so that no tax could be levied thereunder. This attack was not directed against the levy of a tax for one year any more than another year, but went to the right of the county to tax at all. This right to tax lies at the foundation of the second action, and upon that controlling question Coleman was concluded by the former judgment." (*Coleman v. Fields*, 142 Ga. 205.)

The decision of the Supreme Court of Georgia in the *142nd Georgia* is the later case and is a unanimous opinion, and if there is any conflict between it and the *124th Georgia*, then of

course the *124th Georgia* is to that extent overruled and the *142nd* Georgia is the controlling authority.

The statement of this Court in *Wright v. Georgia Railroad & Banking Co.*, 216 U. S. 420, 429, to the effect that a judgment of a Georgia Court cannot be res judicata in regard to subsequent years' taxes, even on the precise point decided, is based solely on *Georgia Railroad & Banking Co. v. Wright*, 124 Ga. 596, discussed above. As pointed out above, that decision of the Supreme Court of Georgia did not deal with the effect of a State Court judgment but with the effect of a judgment of this Court; and any suggestion in that decision that the final judgment of the Georgia Court on the right to tax would not be binding in regard to taxes for subsequent years, even on the same right to tax, is dispelled by the subsequent decision of *Coleman v. Fields*, 142 Ga. 205, which states the controlling Georgia law.

Other decisions upholding contract

Those cases were not by any means the only decisions in which this and similar charter provisions granted by the legislature of Georgia were upheld and enforced. There were many other decisions of this Court and of the Supreme Court of Georgia upholding and applying such provisions, including:

Rome Railroad Co. v. City of Rome,
14 Ga. 275.

City Council of Augusta v. Georgia Railroad & Banking Co.,
26 Ga. 651.

Ordinary of Bibb Co. v. Central Railroad & Banking Co.,
40 Ga. 646.

State of Georgia v. Georgia Railroad & Banking Co.,
54 Ga. 423.

Western & Atlantic Railroad v. State,
54 Ga. 428.

Central Railroad & Banking Co. v. State,
54 Ga. 401.

Central Railroad & Banking Co. v. Georgia,
92 U. S. 665.

Goldsmith v. Rome Railroad Co.,
62 Ga. 473.

Goldsmith v. Georgia Railroad Co.,
62 Ga. 485.

Goldsmith v. Augusta & Savannah Railroad Co.,
62 Ga. 468.

Goldsmith v. Central Railroad Co.,
62 Ga. 509.

Wright v. Southwestern Railroad,
64 Ga. 783.

Southwestern Railroad v. Wright,
68 Ga. 311.

Southwestern Railroad v. Wright,
116 U. S. 231.

State of Georgia v. Southwestern Railroad,
70 Ga. 11.

Wright v. Georgia Railroad & Banking Co.,
216 U. S. 420.

Wright v. Louisville & Nashville Railroad
236 U. S. 687.

Wright v. Central of Georgia Railway,
236 U. S. 674.

Central of Georgia Railway v. Wright,
248 U. S. 525,
On rehearing 250 U. S. 519.

City Council of Augusta v. Augusta-Aiken Ry. & Elec. Corp.,
150 Ga. 529.

In *Gardner v. Georgia Railroad Co.*, 117 Ga. 522, the Supreme Court of Georgia held that the right and method of condemnation set out in the charter of Appellant was an irrev-

ocable contract which could not be impaired. The Court there reviewed and reaffirmed the earlier cases cited above.

In the above cases the validity of the contract of exemption in this and other similar charters was upheld and recognized as being settled beyond question. On the faith of those decisions of this Court and of the Supreme Court of Georgia, several of them involving this very conract, the property of Appellant has been leased for a long term of years, and the present investors have purchased the stock of Appellant. The contention of appellee, if sustained, would sweep away half of their investment. If investors cannot rely on the repeated unanimous decisions of this Court and of the Supreme Court of Georgia, on what can they rely? And without confidence how can there be civilization?

Contentions of appellee on validity of charter conract

Appellee contends that the provision in the charter of Appellant is void and should not be enforced for the following reasons:

1. That the legislature of Georgia was without authority to grant this provision of the charter in the first instance;
2. That the Fourteenth Amendment to the Constitution of the United States has rendered this provision void and unenforceable;
3. That Appellant forfeited its rights by failure to build the line north of Athens toward the Tennessee line and the line from Madison to Eatonton, which it was authorized to build;
4. That the charter provision does not apply to that part of the line between Madison and Atlanta.

The Georgia legislature had authority to grant the charter provision.

This Court has settled that the legislature of a state has the authority to enter into such a contract of partial exemption,

"unless prohibited in terms by state constitutions." *Jefferson Branch Bank v. Shelly*, 1 Black 536; *Humphrey v. Pegues*, 16 Wall. 244. That holding is implicit in the many other decisions of this Court upholding such provisions. Those decisions are collected in an annotation in *173 A. L. R. 15, 25.*

Appellee does not point out any provision of the Constitution of Georgia of 1798, then in force, which in terms prohibits such contract. There is no such provision in that Constitution.

This exact point has been settled by the Supreme Court of Georgia. In *State v. Georgia Railroad & Banking Co.*, 54 Ga. 423, the State issued and levied an execution for taxes on the property of Appellant. Appellant filed affidavit of illegality, the remedy then provided by statute, on the grounds that the provision in the charter was an irrevocable contract preventing the taxation of the property except as there provided, which the State could not impair under the Constitution of the United States. The Supreme Court of Georgia held:

> "By the original charter of the Georgia Railroad and Banking Company, it was, in terms, provided that 'the stock of said company and its branches, shall be exempt from taxation for seven years from the completion of said railroads, or any one of them, and after that, shall be subject to a tax of not exceeding one-half of one per cent. per annum on the net proceeds of their investments:'
>
> "HELD, that under the settled rules of construction, it was competent for the legislature to grant this exemption, and forming, as it does, a portion of the contract of incorporation, any repeal of it by the legislature, without the consent of the corporation, is in violation of article I, Section 10, paragraph I of the Constitution of the United States prohibiting any state from passing any law impairing the obligation of contracts."

State v. Georgia Railroad & Banking Co.,
54 Ga. 423.

In the later case of *Goldsmith v. Georgia Railroad Co.*, 62 Ga. 485, the Court said:

> "It seems to have been the purpose of this court to hold in 54 Ga. 423, that except as to stock issued under the amendment of 1868 authorizing the Clayton branch, the limit put by the charter of the Georgia Railroad and Banking Company upon the taxing power, extends to all the capital stock of the corporation as a railroad company, and is irrepealable. These questions were fairly involved in that case, and the adjudication of them there announced ought to be accepted as final."

Appellee contends that the decision of the Supreme Court of Georgia in *State v. Georgia Railroad & Banking Co.*, 54 Ga. 423, was obiter dicta and should be ignored. The ruling quoted above was the only point decided by the Supreme Court of Georgia. It is impossible for the only point decided by the Court to be obiter dicta. Moreover, under Georgia practice the plaintiff in fi. fa. was not required to file any traverse to an affidavit of illegality unless he wished to raise issues of fact, as distinguished from issues of law, and even in case of issues of fact the traverse was waived if the parties went to trial without traverse. *Georgia Code of 1933*, Sec. 39-1006; *McLeod v. Bird*, 14 Ga. App. 77.

Even if the Supreme Court of Georgia could have decided the 54th Georgia on the technical grounds, it did not do so but decided on the merits. A decision of a court is not obiter dicta because there is another technical ground on which the court could have, but did not, decided the case. *Dooley v. Gates*, 194 Ga. 787, 792.

The Fourteenth Amendment to the Constitution of the United States did not void this provision.

The contention of Appellee that the Fourteenth Amendment to the Constitution of the United States voided this provision, if sustained, would require this Court to overrule literally scores of decisions upholding and enforcing such provisions

since the Fourteenth Amendment was adopted. The cases are collected in *173 A. L. R. 15, 25.* This contention is so clearly without merit that we will not labor the point.

Appellant did not forfeit its charter rights by failure to build a line north of Athens or a line from Madison to Eatonton.

Appellee contends that by failure to build a line north of Athens toward the Tennessee line and a line from Madison, Georgia, to Eatonton, Georgia, as authorized in the charter as amended, Appellant forfeited the contract of exemption as to the lines actually built in accordance with the charter.

Appellee has cited no case, and we can find none, holding that failure of a railroad to build all of the lines authorized by its charter works a forfeiture of its contractual rights in regard to the lines actually built. If such were the law, practically every corporation would be subject to having its charter rights forfeited, for it is common knowledge that charters almost always contain more powers than are ever exercised by the corporation. The nearest case we have found is *Illinois Trust Co. v. Doud,* 105 F. 123 (C. C. A. 8). In that case the charter granted the right to build an electric system and a gas system. The argument was made that by failing to construct and operate a gas system the corporation would forfeit its right to operate its electric system. The court summarily rejected the contention.

Moreover, it is settled that the rights set out in a corporate charter can be forfeited for non-user or misuser only in a direct proceeding brought by the State against the corporation for that purpose. *Young and Calhoun v. Harrison & Harrison,* 6 Ga. 130; *City of Atlanta v. Gate City Gas Light Co.,* 71 Ga. 106; *The Union Branch Railroad Co. v. East Tennessee & Georgia Railroad Co.,* 14 Ga. 327.

In this case not only were there no proceedings to forfeit the right set out in the charter, but the State through the legislature clearly approved the use made by the corporation of its capital.

Before examining the several statutes, we must again return ourselves to the conditions existing when those statutes were passed.

This railroad was apparently the first railroad organized in Georgia (*Cooper, The Story of Georgia,* Vol. II, p. 339). It was the second long-line railroad in the United States, the first being the Charleston and Hamburg Railroad of South Carolina completed in 1833.

At the time these charters were granted, the routes over which it was possible and desirable to build railroads were most uncertain. The possible routes had not been surveyed and some were almost unexplored. For example, it was then thought both by the Governor and the people, that the best proposal was to join the headwaters of the Tugaloo and Chattahoochee Rivers by canal so as to connect the Atlantic and the Gulf by navigable streams. This demonstrates the complete ignorance of the mountainous terrain at the headwaters of those rivers. A state Commission and a State Engineer were necessary to dispell these misapprehensions (*Cooper,* Vol. II, p. 334).

Also it was then believed that a railroad could be built south from Cincinnati to the Georgia line north of Athens. In 1835 the charter of the Georgia Railroad was amended to authorize it to extend its lines north of Athens to connect with such road, if and when built. Of course the mountains of Eastern Tennessee made it impractical to build such line, and it was never built. Instead, it was found that the only practical route was through the Chattanooga Gap.

In 1837 the State, with the proceeds of state bonds, began building a railroad from Chattanooga to Atlanta, then just a point in the wilderness. Such railroad would be useless for the development of the State unless it could be connected with the Atlantic seaboard. Obviously the best way to connect it with the Atlantic seaboard was by extending the southern branch of the Georgia Railroad from Greensboro to Atlanta instead of to Eaton.

Accordingly, by the Act of 1837, the legislature, after reciting the plans to build the State road, authorized the Georgia Railroad to employ its capital in extending its line through Greensboro to Atlanta. (app. xv.)

This proved to be an undertaking of immense difficulty, particularly in view of the financial panics which ensued. It was not until 1845 that the railroad was able to complete its line to Atlanta.

With this background let us look at the various statutes.

Sec. 15 of the original charter of 1833 expressly provides that the partial exemption from taxation should apply "after the completion of said railroads, *or any one of them.*" This is the clearest possible expression of legislative intent that the partial exemption would apply to "any one" of the railroads completed. (app. v.)

Sec. 1 of the original charter of 1833 provides that the railroad *shall* build the railroad from Augusta to Union Point, and that when this main road is completed the railroad "shall *have power* to construct three branches," and that, if the capital is not sufficient to build all three, then "the branch shall be first completed which the stockholders may by vote designate." (app. i.)

Sec. 15 giving this railroad exclusive franchise for 36 years, provides as a condition that "the work from, or between Augusta, and *either* [not both] of the places hereinbefore mentioned be commenced within two years and completed in six years." (app. v.)

Therefore, even as to the exclusive franchise, the charter required that only one, and not both, of the branches be completed.

Sec. 24 provides that the stockholders might divide the railroad from Augusta to Union Point, and the several branches, into separate corporations, and that none of such corporations would be responsible for the acts or omissions of the others. This is the clearest possible expression of intent that the

power to build the several branches was severable, and that the failures of one would not impair the rights of the others. (app. viii.)

Sec. 2 of the Act of 1835 amending the charter (*Ga. Laws 1835*, p. 180), provides that one-half of the capital might be used for banking purposes "until the completion of the road to Athens, and *one* of the Southern branches through Greensboro, to be designated by the vote of the stockholders; at which time any capital stock unemployed may be used for banking purposes." (app. xi.)

The right to use all capital for banking after the Athens branch and one branch through Greensboro were completed demonstrates the legislative intent that such would be complete compliance with the charter. The right then to use all remaining capital for banking negatives the duty to use such capital for building further railroads.

The Athens branch and one southern branch through Greensboro was built in complete compliance with the charter.

Moreover, Sec. 11 provides that the only penalty for failure to build even one southern branch would be forfeiture of the right to use part of the capital for banking. If the legislature had intended additional penalty of forfeiture of tax exemption, it certainly would have said so. (app. xiv.)

The Act of 1837 recites the plans to build the State road from Atlanta to the Chattahoochee River and authorizes the Georgia Railroad to use its capital to extend the southern branch from Greensboro to Atlanta to connect with the State road (*Ga. Laws* 1837, p. 212; app. xv.)

The legislature certainly knew that the railroad had not then built a line to Eatonton or north of Athens. It also knew that the building of the road to Atlanta would tax the capital of the railroad to the utmost. It obviously considered the building of the southern branch to Atlanta far more important than building such branch to Eatonton.

By the Act of December 11, 1858, the legislature authorized an increase of capital to build a line to Eatonton and provided

that such increased capital should be subject to tax at the usual rate, but that the Act should "under no circumstances be construed as to authorize any increase of rate of taxation upon any other stock or property connected with said company other than the additional stock allowed by this Act." (*Ga. Laws 1858*, p. 66; app. xvii.)

Finally, by the Act approved December 7, 1859, and the Act approved December 19, 1859 (Georgia Laws 1859, p. 314, 315), the legislature withdrew from this railroad the right to build the Eatonton branch and conferred the exclusive right on the Eatonton and Madison Railroad. The charter of the latter company provided that it would have all the privileges and immunities of the Central Railroad & Banking Co. One of such privileges was that no other line could be built within twenty miles (Georgia Laws 1833, p. 246). This clearly withdrew any right of The Georgia Railroad & Banking Company to build a branch to Eatonton.

In regard to the line north of Athens, the Act of 1835, which authorized the building of the line north of Athens expressly provided:

> "Provided, however, that the continuation of said road beyond Athens, so as to connect with the Cincinnati road, shall be steadily prosecuted *so soon as the company shall have satisfactory evidence that such connection can be formed.*" (app. xi.)

The preamble of that Act recites that it was contemplated that the people of Cincinnati would build a railroad south from Cincinnati to the Tennessee-Georgia line north of Athens. The Georgia Railroad was authorized to extend its line north of Athens to connect with this line when it was apparent that the connections could be formed.

It is a fact of history, of which this Court will take judicial notice, that the Cincinnati line was never built south from Cincinnati toward the Georgia line north of Athens, because of the mountainous terrain, so that the circumstances under which the Georgia Railroad was authorized to build a line

north of Athens—the feasibility of connecting with the Cincinnati line—never occurred.

If the matter were otherwise in doubt, the failure of the State or anyone connected with the State to raise any objection to the failure of the railroad to build such lines for over a hundred years during which every person having any knowledge of the circumstances has died in the records have been lost or destroyed, would bar the raising of the contention at this late date. It is significant, for example, that General Toombs who was in the center of public affairs during this period and who was counsel for the State in the *54th Georgia* and in the *62nd Georgia*, did not contend that the railroad had not fully performed its obligations under its charter. He knew that the railroad had done precisely what the legislature desired it to do in using its capital to extend its southern branch to Atlanta to connect with the State road.

Counsel for the amiciae curiae cites and relies upon *State v. Morgan*, 28 La. 49. At first glance this case may appear to be pertinent. However, in that case the exemption was for a limited period of ten years after the completion of the railroad. The railroad was never completed. Yet it claimed the exemption many years after the expiration of the ten years from the time when the railroad should have been completed. The railroad in that case was trying to extend an exemption for a limited period of ten years to a perpetual exemption by the simple expedient of never completing the railroad. Moreover, the case was actually decided on the grounds that the exemption had been lost by sale at foreclosure. See *Morgan v. La.*, 93 U. S. 217.

Atlanta Branch is covered by the charter provision.

Appellee contends that, in any event, the Atlanta branch, between Madison and Atlanta, is not subject to the special provision as to taxation.

The Act approved December 25, 1837 (App. xv) expressly provides that Appellant "shall have all the powers and privi-

leges, rights and *immunities* in the construction of said branch from Madison, as aforesaid, to the said state railroad, as are contained in the several acts heretofore passed, and now in force, constituting eth charter of the Georgia Railroad and Banking Company, as fully and to the same extent as if said continuation had originally been part of the Georgia Railroad."

Moreover, the original charter provided that the "capital" of Appellant should be subject to tax only as provided in the charter. The courts have held that this meant the property in which the original capital was lawfully invested. Certainly the original capital was lawfully invested in the Atlanta branch and therefore is subject to the special provisions for tax to the same extent as other property in which the capital was lawfully invested.

This question has been decided against Appellee both by the Supreme Court of Georgia and by this Court. In *State of Georgia v. Georgia Railroad & Banking Co.*, 54 Ga. 423, the lower court specifically considered and decided what property of the railroad was exempt and held that all of the property, except that acquired with the proceeds of the sale of 440 shares of new stock issued after 1863, was exempt. That decision was affirmed by the Supreme Court.

And in *Wright v. Georgia Railroad & Banking Co.*, 216 U. S. 420, the Comptroller General, by his counsel the Attorney General, specifically asked the court to consider and decide what property was subject to the special tax provision. The Circuit Court held, by specific description, that the Atlanta branch was subject to that provision. This Court also considered what property was subject to that provision and held that the Washington branch, which had been acquired in a subsequent merger, was not exempt but affirmed the decree as to the Atlanta branch.

And in *Wright v. L. & N. Railroad*, 236 U. S. 687, this Court specifically dealt at some length with the Atlanta terminals, which of course were part of the Atlanta branch, and specifically held that the parts of the Atlanta terminal which were

built by Appellant and leased to the lessees were still exempt under the provision of the charter of Appellant.

There is no plain remedy in the courts of Georgia.

The decision of the Supreme Court of Georgia in the proceedings brought by Appellant under the mandate of this Court, entered in reliance on the assurance of the Attorney General that there was a plain remedy by appeal to the courts of Georgia, should lay at rest the contention that there is such plain remedy in the courts of Georgia as will deprive the Federal Court of jurisdiction.

Appellant now has tried and been denied three remedies in the courts of Georgia:

(1) By appeal from the assessment of the Commissiontr to the Superior Court of Georgia, *Georgia Railroad & Banking Co. v. Redwine*, 66 S. E. (2d) 234, entered June 13, 1951, motion for rehearing denied July 24, 1951.

(2) By suit for declaratory judgment in the Superior Court of Georgia, *Musgrove v. Georgia Railroad & Banking Co.*, 204 Go. 139, appeal dismissed 335 U. S. 900.

(3) By suit to enjoin the State Revenue Commissioner in the State Court, *Musgrove v. Georgia Railroad & Banking Co.*, supra.

The Supreme Court of Georgia has expressly declined to express an opinion on what remedy, if any, is available to Appellant in the courts of Georgia, although requested to do so. *Musgrove v. Georgia Railroad & Banking Co.*, 204 Ga. 139, 159.

Three Justices of the Supreme Court of Georgia have said:

". . . Any other construction [than that the remedy by appeal exists] leaves uncertain and indefinite how a railroad company, or similar body, can have its tax liability adjudicated in the courts.

". . . From a study of the provisions of Title 92 of our Code, we are constrained to the view that there is no part of our law more perplexing and confusing than the Code provisions relating to procedures involved in the administration of those laws. There exists much confusion as to the matter of affidavit of illegality, and other procedure for a taxpayer of the kind here involved to raise the issue of taxability. The history of this litigation demonstrates that confusion." *Georgia Railroad & Banking Co. v. Redwine*, 66 S. E. (2d) 234, 241.

Nothing has been said to the contrary by any of the other Justices.

Appellee has admitted that, since the Supreme Court of Georgia has determined that Appellant does not have the right of appeal, there is no other remedy in the courts of Georgia. In his motion for rehearing to the Supreme Court of Georgia (par. 7, p. 3) he said:

"In deciding sua sponte that the Act of 1943 supra took away the only available method open to the Railroad to review judicially the question to its taxability ad valorem. . ."

And in his brief in support of his motion for rehearing he said (p. 14):

"The construction placed upon the Act of 1943 takes away from the Railroad the only remaining method for judicial determination of questions of taxability." (See p. 13, supra, in which the statements are quoted more at length.)

In his brief appellee lists four remedies in the courts of Georgia which he contends are "plain, speedy and efficient." These are:

(1) By appeal from the assessment to the Superior Court;

(2) By payment of the tax and suit in the Superior Court;

(3) By suit to enjoin in the Superior Court of Fulton County, Georgia; and

(4) By affidavit of illegality.

(1) *No right of appeal.*

The decision of the Supreme Court of Georgia in *Georgia Railroad & Banking Co. v. Redwine*, 66 S. E. (2d) 234 lays at rest the contention that there is an adequate remedy by appeal. The Court held that plainly there was no such remedy.

(2) *No adequate remedy by payment and suit to recover.*

The Act of 1938 (App. xxviii) does give taxpayers right to sue to recover any state tax erroneously or illegally paid to the State Revenue Commissioner.

However, only a relatively small part of this tax would go to the State of Georgia. By far the greater part would be payable to the local county tax collectors. There is no provision under the Georgia law for recovering taxes paid to a local county tax collector.

(3) *No right to enjoin in the Superior Court of Fulton County.*

The Act of 1938 (App. xxix) expressly provides:

> "The Commissioner's assessment shall not be reviewed except by the procedure hereinafter provided; no trial court shall have jurisdiction of proceedings to question such assessments except as in this Act provided."

The courts of Georgia have held that that provision means what it says. *Forrester v. Pullman Co.*, 192 Ga. 221. There is no provision for suit for injunction in the 1938 Act.

The cases cited by appellee were all cases that arose before the Act of 1938, withdrawing the right of injunction.

In *Musgrove v. Georgia Railroad & Banking Co.*, 204 Ga. 139, Appellant did pray for injunction, and the Supreme Court of Georgia held that such suit could not be maintained.

(4) *There is no remedy by affidavit of illegality.*

It should be plain from the recent proceedings that there

is no plain remedy by affidavit of illegality. In response to the question of this Court as to what the remedy of Appellant was, counsel for Appellee stated that the remedy was by appeal to the Superior Court. Obviously he considered that remedy the plainest. Since the remedy which appeared plainest to counsel for appellee has now been held plainly not to exist, it is not likely that his third choice would be any plainer.

As pointed out above (p. 40), in his motion for rehearing to the Supreme Court of Georgia, appellee admitted, and in fact insisted, that neither the remedy of affidavit of illegality nor any other remedy would be available to Appellant.

Three of the Justices of the Supreme Court of Georgia said:

> "There exists much confusion as to the matter of affidavit of illegality." *Georgia Railroad & Banking Co. v. Redwine*, 66 S. E. (2d) 234, 241.

An examination of the statutes of Georgia certainly confirm that statement.

The Act of 1938, quoted above on p. 41 and in the Appendix at p. xxix, clearly withdrew the right of affidavit of illegality, if any existed at that time.

It is true that the Act of 1943 did provide:

> "Provided, however, that nothing herein contained, and no provision of this Act shall be construed to deprive a taxpayer against whom an execution for taxes has been issued under an assessment of the State Revenue Commissioner of the right to resist enforcement of the same by affidavit of illegality." (App. xxxii)

That Act did not, however, purport to create any right of affidavit of illegality. It merely said that it would not be construed as depriving the taxpayer of any such right that might then exist. At the time that Act was passed no right of affidavit of illegality existed in the situation of Appellant. Such right had probably been withdrawn by the Act of 1918 (App. xxvii) and certainly had been repealed by the Act of 1938 (App. xxix).

Moreover, there was never an adequate remedy of affidavit of illegality available to Appellant in the circumstances of this case. The two statutes cited by appellee as granting that right are the Act of 1931, codified in Sec. 92-7301 of the Code of 1933, and the Act of 1874, codified in Sec. 92-2602, 92-2603 and 92-2604.

While the Act of 1931 did provide for an affidavit of illegality to executions issued by the State Revenue Commissioner created by the Act, Sec. 82 of that Act further provided (Georgia Laws 1931, p. 34):

> "Section 82. All powers and functions heretofore imposed by law on the Comptroller General . . . are hereby imposed and retained."

The ad valorem taxation of railroads was a function prevously imposed on the Comptroller General. Sec. 82 therefore excepted those functions from the matters transferred to the State Revenue Commissioner. The officials of the State of Georgia have so construed that Act, and have construed Sec. 92-7301 as not applying to executions for ad valorem taxes against railroads, as will be seen from the annotator's note under that section in the Annotated Code.

The Act of 1874, codified in Code Sec. 92-2604, expressly provided that railroads might file an affidavit of illegality only "after making the returns required by Section 92-2602 and after paying the tax levied on such corporation." (App. xx) The Supreme Court of Georgia has held that compliance with that condition, within the time provided by law, is a condition precedent to the right of affidavit of illegality, and that failure to comply will result in dismissal. *Goldsmith* v. *Georgia Railroad Co.*, 62 Ga. 485. The Supreme Court of Georgia therefore held that the remedy of affidavit of illegality with not adequate and that suit for injunction would lie under the law as it then existed because of the failure of an adequate remedy at law.

> "It (the Railroad) is remedyless now under the mode provided by the Act of 1874. It has no remedy at law as

the case now stands. It cannot make now the returns required to have been made in 1876 and 1877 because the time is passed; and if it has any remedy it is in equity." *Wright* v. *Southwestern Railroad Co.*, 64 Ga. 783, 793.

Moreover, this remedy, if available, would mean a vast multiplicity of suits. The law provided that the Commissioner shall issue separate executions for the tax due to the State and for the tax due to each county and city, and that affidavit of illegality to such executions shall be returned to the Superior Court of the county in which the tax is claimed (App. xxiv). This Railroad runs through 14 counties and 16 municipalities. Taxes for twelve years are now claimed. To resist all these taxes by affidavit of illegality would require 372 proceedings in 14 different courts.

Any procedure involving such multiplicity of actions certainly is not adequate or "efficient". *Graves* v. *Texas Co.*, 298 U. S. 393; *Union Pacific Railroad* v. *Weld County*, 247 U. S. 282; *Risty* v. *Chicago R. I. P. Railroad*, 270 U. S. 378.

Moreover, as pointed out at the outset, any right of affidavit of illegality which existed prior to 1938 was clearly repealed by the Act of 1938 and has not been reenacted.

Respectfully submitted,

ROBERT B. TROUTMAN
FURMAN SMITH
Attorneys for Appellant

Spalding, Sibley, Troutman & Kelley
434 Trust Company of Georgia Bldg.
Atlanta, Georgia
of Counsel for Appellant.

APPENDIX

STATUTES OF GEORGIA CITED

1. Charter of Georgia Railroad & Banking Co., and Amendments Thereto.

(1) Act Approved December 21, 1833, Georgia Laws of 1833, p. 256.

AN ACT—*To Incorporate the Georgia Railroad Company, with powers to construct a Rail or Turnpike Road from the City of Augusta, with Branches Extending to the Towns of Eatonton, Madison, in Morgan County, and Athens; to be carried beyond those places, at the discretion of said Company; to punish those who may wilfully injure the same; to confer all corporate powers necessary to effect said object; and to repeal an Act entitled "An Act to authorize the formation of a Company for constructing a Railroad or Turnpike from the City of Augusta to Eatonton, and thence westward to the Chattahoochee River, with Branches thereto, and to punish those who may injure the same," passed the 27th December, 1831.*

SEC. 1. *Be it enacted, etc.*, That the Company provided for in this Act, and hereinafter more especially incorporated and authorized, shall and may direct and confine their first efforts and enterprise to the formation and completion of a Railroad communication between the City of Augusta and some point in the interior of the State, to be agreed upon by the stockholders, which Road shall be called the Union Railroad; and the same being completed, the Company shall have power to construct three Branch Railroads, beginning at the point agreed upon as the termination of the Union Railroad, or such point for the Middle Road as the stockholders may select; one running to Athens—one to Eatonton—and the third to Madison,

in Morgan County; which Branches shall be erected simultaneously; *Provided*, The amount of stock subscribed will warrant the completion of all at the same time; and if the stock subscribed will not warrant the completion of all of said Branches at one and the same time, then that Branch shall be first completed which the stockholders may by vote designate. The Company shall have the further power to continue the Athens Branch towards any point which may be agreed upon, on the Tennessee River—all of which shall be done at such time and in such manner as the stockholders may direct.

SEC. 2. The Company shall have the exclusive privilege of constructing Railroads from any point in this State within twenty miles of the Road herein designated as the Union Road and its Branches, leading to Eatonton, Athens and Madison, continuously to the City of Augusta, for and during the term of thirty-six years.

SEC. 3. The stock of the Company authorized and incorporated by this Act shall consist of fifteen thousand shares, of one hundred dollars each share, and the said Company to be formed on that capital; but the said Company shall be at liberty to enlarge their capital, as, in the progress of their undertaking, they may find necessary; and that, either by additional assessments on the original shares, not to exceed in the whole the sum of twenty dollars in addition to each original share, or by opening books for enlarging their capital by new subscriptions, in shares of not more than one hundred dollars, so as to make their capital adequate to the works they may undertake, and also to prescribe the terms and conditions of the new subscriptions. And it shall be lawful for the company, from time to time, to invest so much, or such parts of their capital, or of their profits, as may not be required for immediate use, and until it may be so required, in public stock of the United States, or of this State, or of any incorporated Bank, or lend out the same at interest on good security, and draw and apply the dividends, and when and as they shall see fit, sell and transfer any parts or portions thereof: *Provided*, That nothing herein contained shall be so construed as to authorize said Company

to issue bills of credit, or to loan out any moneys at a greater rate of interest than eight per cent.

* * *

SEC. 9. The aforesaid Company, to be organized as aforesaid, shall be called "The Georgia Railroad Company," and shall have perpetual succession of members, may make and have a common seal, and break or alter it at pleasure; and by their corporate name aforesaid may sue and be sued, answer and be answered unto, in all courts of law and equity, or judicial tribunals of this State; and shall, at all times, be capable of making and establishing, altering and revoking all such regulations, rules and By-Laws for the government of the Company and its Directors, as they may find necessary and proper for the effecting of the ends and purposes intended by the Association and contemplated in this Act: *Provided*, Such rules and regulations, and By-Laws, shall not be repugnant to the Laws and Constitution of this State.

SEC. 10. The said Georgia Railroad Company shall have power and capacity to purchase, and have and hold, in fee simple, or for years, to them and their successors, any lands, tenements or hereditaments that they may find necessary for the site, on and along which, to locate, run and establish the aforesaid Railroad and Railroads, or any Branches thereof; or to vary or alter the plan or plans, and of such breadth and dimensions through the whole course of the Road and Roads, as they may see fit; and also, in like manner, to purchase any lands contiguous, or in the vicinity of the Railroad and Railroads, hereby authorized, that they may find necessary for the procuring, and from time to time, readily obtaining all necessary or proper materials, of what kind soever, for the constructing, repairing, and adequately guarding and sustaining the said Railroad or Railroads; and in like manner to purchase all rights of way on land, and all necessary privileges in waters or water courses, that may lie on or across the route which the said Railroad or Railways may pass; and also all lands contiguous thereto, that may be found necessary for the erecting of toll houses, store houses, workshops, barns, stables, resi-

dences and accommodations for servants or agents or mechanics, and for the stationing and sustaining all animals of labor. And the said Company shall have power, if need be, to conduct the Railroad across any public road, and, by suitable bridges over and across all or any rivers, creeks, water or water courses, that may be in the route; or if they should deem it more convenient and suitable, may pass carriages, using the Roads, by convenient boats, across the same: *Provided*, That the said Company shall so construct their Railroad across all public roads as not to obstruct or injure the same.

* * *

SEC. 12. The said Georgia Railroad Company shall, at all times, have the exclusive right of transportation or conveyance of persons, merchandize, and produce, over the Railroad and Railroads to be by them constructed, while they see fit to exercise the exclusive right: *Provided*, That the charge of transportation or conveyance shall not exceed fifty cents per hundred pounds, on heavy articles, and ten cents per cubic foot, on articles of measurement, for every one hundred miles; and five cents per mile for every passenger: *Provided, always*, That the said Company may, when they see fit, rent or farm out all or any part of their exclusive right of transportation or conveyance of persons on the Railroad or Railroads, with the privilege to any individual or individuals, or other company, and for such term as may be agreed upon, subject to the rates above mentioned. And the said Company, in the exercise of their right of carriage or transportation of persons or property, or the persons so taking from the Company the right of transportation or conveyance, shall, so far as they act on the same, be regarded as common carriers. And it shall be lawful for the said Company to use or employ any section of their intended Railroad, subject to the rates before mentioned, before the whole shall be completed, and in any part thereof, which may afford accommodation for the conveyance of persons, merchandize or produce. And the said Company shall have power to take, at the store houses they may establish on or annexed to their Railroad, all goods, wares, merchandize and produce

intended for transportation or conveyance; prescribe the rules of priority; and charge such just and reasonable terms and compensation for storage and labor as they may by rules establish (which they shall cause to be published), or as may be fixed by agreement with the owners; which compensation shall and may be distinct from the aforesaid rates of transportation.

* * *

SEC. 14. Whenever the Company aforesaid shall see fit to farm out as aforesaid, to any person or persons, or body corporate, any part of their exclusive right of conveyance and transportation, or shall deem it expedient to open the said road, or any part thereof, to public use, they shall and may adopt and enforce all necessary rules and regulations, and have power to prescribe the construction and size or burthen of all carriages and vehicles, and the materials of which such shall be made, that shall be permitted to be used or pass on the said Railroad, and the locomotive power shall be used with them.

SEC. 15. The exclusive right to make, keep up and use the Railroads and transportations, authorized by this Act, shall be for and during the term of thirty-six years, to be computed from the time when the said Road from Augusta to either of the points hereinbefore designated, shall be completed for transportation: *Provided*, That the subscription of stock or shares of said Company to the amount of at least five thousand shares as aforesaid, be filled up within six months from the passing of this Act, and the work from, or between Augusta, and either of the places hereinbefore first mentioned, be commenced within two years and be completed within six years after the five thousand shares shall be subscribed. And after said term of thirty-six years shall have elapsed, though the Legislature may authorize the construction of other Railroads, for the trade and intercourse contemplated herein: *Nevertheless*, The Georgia Railroad Company shall remain and be incorporate, and vested with all the estate, powers and privileges as to their own works herein granted and secured, except the exclusive right to make, keep up, and use Railroads over and through such parts of the country, that shall so have expired

by the foregoing limitations; but the Legislature may renew and extend that exclusive right, upon such terms as may be prescribed by law, and be accepted by the said incorporated Company. The stock of the said Company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said Railroads, or any one of them; and after that, shall be subject to a tax not exceeding one-half per cent. per annum on the net proceeds of their investments.

* * *

SEC. 18. Every person who shall be a subscriber to or holder of stock in the said Company, shall pay to the Company the instalment of fifteen dollars on each and every share, in such periods of not less than six months, as shall be prescribed and called for by the Directors, after which the Directors may call for the further moiety of each share, in payments not exceeding fifteen dollars per share, in periods of not less than six months, of which periods of payment by instalment on the shares, and the sums required, the Board of Directors shall cause public notice to be given for at least four weeks previously to the day of payment, by advertising the same in one or more of the gazettes of Milledgeville and Augusta; And failure to pay up any one of the instalments so called for as aforesaid shall induce a forfeiture of the share and shares on which default shall be so made, and all past payments thereon, and the same shall vest in and belong to the Company, and may be appropriated as they shall see fit. It shall be the duty of the Company, as soon as may be after they are organized, or of the Board of Directors, to issue scrip to each subscriber for the shares he holds, and deliver the same at the time of the second payment; on which, if convenient and practicable, receipts for the instalments paid, and that may successively be paid, may be endorsed, and the scrip issued may be made assignable and transferable in person or by attorney, at the office and on the books of the Company; and the said corporation shall and may, in and by their By-Laws, rules and regulations, prescribe the mode of issuing the evidences of shares of stock and the terms

and conditions, as also the times and manner in which shares in the Company may be transferred.

SEC. 19. Whensoever the said Company shall find occasion to increase their capital by additional assessments on the original shares, as before mentioned, in the third section of this act, within the limits therein mentioned, the said further sum on each share shall not be called for in less than two instalments at similar periods, and like notices as are mentioned and provided in the immediately preceding section; and failure to pay up such additional assessments shall in like manner, as therein provided, induce a forfeiture of the Company of the share or shares of stock on which default should so be made.

SEC. 20. The President and Directors shall be styled "The Directors of the Corporation," and shall make all contracts and agreements in behalf thereof, and have power to call for all instalments, declare all dividends of profits, and to do and perform all other acts and deeds which, by the By Laws of the corporation, they may be empowered or required to do and perform; and the acts of the Direction, or their contracts, authenticated by the signatures of the President and Secretary, shall be binding on the corporation without seal. Regular minutes shall be kept of all meetings of the Direction, and of the acts there done; and the Direction shall not exceed in their contracts the amount of the capital of the corporation; and in case they shall do so, the President and Directors who are present at the meeting at which such contract or contracts so exceeding the capital shall be made, shall be jointly and severally liable for the amount of the excess, both to the contractor or contractors and to the corporation: *Provided*, That any one may discharge himself from such liability by voting against such contract or contracts and causing such vote to be recorded in the minutes of the Direction, and giving such notice thereof to the next general meeting of the stockholders.

* * *

SEC. 22. If the Company, instead of constructing the Railroads herein specified, should deem it preferable to construct

common roads, and use steam carriages thereon, they shall have power to do so under the same regulations, and with the same privileges in all respects as are herein prescribed in relation to railroads.

SEC. 23. The Act entitled "An Act to authorize the formation of a Company for constructing a Railroad or Turnpike from the City of Augusta to Eatonton, and thence westward to the Chattahoochee River, with Branches thereto, and to punish those who may injure the same," passed the 27th December, 1831, is hereby repealed in every clause and section thereof; and this Act of incorporation shall b deemed and taken to be a Public Act, and shall be judicially taken notice of as such without special pleading.

SEC. 24. Whensoever a number of the stockholders in interest amounting to three thousand shares, shall unite fo. the furtherance, construction and completion of either of said Branches of said Road, they shall have power to terminate said Union Road, and may, at such time and place as they may choose and designate, determine for themselves the point or place of diverging with such Branch of said Road as they may then and there point out and ascertain to be identified with their interest as stockohlders: *Provided*, The said stockholders so electing shall have given to the said Union Company, their agents or attorney, ten days previous notice of such their choice, of their respective names and their respective disunion, of stock, and of the point or place of their intended disunion. That said stockholders so electing and determining as aforesaid, shall and may then and there be and exist as a separate body corporate, and shall then and there, and thenceforward, have, use, and exercise all the rights, privileges, immunities and enjoyments hereby given, granted and secured to said Union Company, to attach, be held, used and exercised by said stockholders so electing as aforesaid, of, for, on account of, and to the particular Road to which they may then and there direct and apply themselves. That their powers as a corporate body shall be similar, and their rights, privileges and immunities, in regard to said Road, so diverging, shall be the

same, and subject to the same restrictions, as herein and hereby provided, imposed and granted to, upon and for the said Union Company. They shall not be called on by said Union Company, from and after the day of their said election and determining said point of diverging, for any other or further payment on stock, but may proceed as a distinct Company to construct a Branch of said Road to and through the respective points Eatonton, Greensborough and Madison, or Athens, respectively, according to circumstances, as they may choose—and said stockholders so electing and determining as aforesaid, shall be known, according to the Branch to which they shall respectively attach themselves, by the corporate name and style of the Eatonton Railroad, the Greensborough and Madison Railroad, or the Athens Railroad. And said Branch Companies, so named, shall and may apply the residue of their stock, unpaid and unapplied at said time of diverging, to the separate and sole use and construction of the Branch to which each may be attached, and shall and may have, use and enjoy, all the rents, issues and profits of said Branch, to which they may be attached, to the sole use, benefit and behoof of themselves, their heirs and assigns, for the time heretofore limited to said Union Company, and according to the provisions of this Act. They shall in no way be liable to each other as separate Companies, for the expenses or repairs of their respective Roads, nor in any way responsible for each other's acts, from and after the time and place of disunion or diverging, designated aforesaid, so long as they may remain and exist as separate Companies. The stockholders in the Union Road, to the point of diverging, shall, nevertheless, exist as one corporate body, and be liable as such that far, and receive the benefits of said Union Road to said point, according to the provisions hereinbefore contained: *Provided*, That nothing herein contained shall prevent said Branch Companies from uniting their interests and efforts, as circumstances mutually moving them may suggest.

(2) Act approved December 18, 1835, Georgia Laws of 1835, p. 180.

WHEREAS, The people of the West have in contemplation to make a communication between the City of Cincinnati and the

Southern Atlantic coast by means of a Railroad; and whereas the best route for said communication is believed to be through the State of Georgia; and whereas, the building of the Georgia Railroad is now in progress, and will be an important link in the line of said communication.

SEC. V. *Be it, therefore, enacted, &c.*, That the stockholders of the Georgia Railroad Company, and such other persons as shall take stock under this Act, and their successors and assigns, shall hereafter be a body corporate by the name and style of the Georgia Railroad and Banking Company, and by the said corporate name shall be, and are hereby made able and capable in law, to have, purchase, receive, possess, enjoy, and retain, to them and their successors, lands, rents, tenements, hereditaments, goods, chattels, and effects, of whatsoever kind, nature or quality the same may be, sufficient for the construction of banking houses, and the erection of the Railroad only, and the same to sell, grant, demise, alien, or dispose of; to sue and be sued, plead and be impleaded, answer and be answered unto, defend and be defended in courts of record, and also to make and have a common seal, and the same to break, alter or renew, at their pleasure, and also, by and through the Board of Directors, to ordain, establish, and put in execution, such by-laws, rules and regulations as shall be necessary and convenient for the governing of said corporation, as to them may or shall appertain; *Provided*, That such by-laws, rules and regulations shall not be contrary to the Laws and Constitution of this State or of the United States, nor to the rules, regulations, restrictions and limitations prescribed in this Act.

SEC. 2. *Be it further enacted*, That the stock of said Company shall consist of two millions of dollars, one-fourth of which, applied to banking purposes, shall be gold or silver coin, in shares of one hundred dollars each; of which capital one-half may be used for banking purposes, and not more, until the completion of the Road to Athens, and one of the southern Branches through Greensborough, to be designated by a vote of the

stockholders; at which time any capital stock unemployed may be used for banking purposes; *Provided, however,* That the continuation of said Road beyond Athens, so as to connect with the Cincinnati Road, shall be steadily prosecuted so soon as the Company shall have satisfactory evidence that the said connection can be formed.

SEC. 3. *And be it further enacted,* That the Directors of the Georgia Railroad Company, for the time being, shall have power at their discretion to open books of subscription at such times and places as they may think proper, giving such notice in one or more of the public gazettes of this State as they may deem necessary for additional subscriptions to the capital stock of said Georgia Railroad and Banking Company; on which subscriptions there shall be required to be paid, at the time of subscribing, the amount per share that may be prescribed by the Directors aforesaid; and that the President and Directors of the Georgia Railroad Company, for the time being, shall be the President and Directors of the new corporation until the time fixed for the annual election next thereafter.

SEC. 4. *And be it further enacted,* That the Board of Directors of the said corporation shall have power at its discretion to establish agencies for carrying on said work, and may have branches of its banking powers, not exceeding three, and at such times as to them may seem expedient: *Provided,* That no branch for banking purposes shall be established or located in any incorporated town without the consent of the corporate authorities thereof first obtained for that purpose.

SEC. 5. *And be it further enacted,* That the Directors aforesaid shall have power to open books for the subscription of stock, from time to time, until the capital stock shall be filled up; and that all further instalments on the stock herein provided to be subscribed for, shall be called for and paid in according to the provisions of the Act of which this is an amendment, and shall be under the same liabilities in case of failure to pay.

SEC. 6. *And be it further enacted*, That the bills obligatory and of credit, notes, and other contracts whatsoever, in behalf of the said corporation, shall be binding and obligatory on the said corporation: *Provided*, The same be signed by the President and countersigned by the Cashier of the said Company; and the funds of the corporation shall, in no case, be held liable for any contract or engagement whatsoever, unless the same shall be so signed and countersigned, as aforesaid, except for such checks or bills of exchange as shall be made or endorsed by the Cashier or President thereof, in the course of the business of said Company, and except for such contracts as shall be made under the authority of the Board for work done on the Road; and the funds of the corporation shall, at all times, be subject to the inspection of the Board of Directors and Stockholders, when convened, according to the provisions of this Act, and of the Act of which this is an amendment.

SEC. 7. *And be it further enacted*, That the said corporation shall not, at any time, suspend or refuse payments in gold or silver coin, or any of the notes, bills or obligations, and if the said corporation shall, at any time, refuse or neglect to pay, on demand, any bill, note or obligation, issued by the corporation according to the contract, promise or undertaking, therein expressed, to the person or persons entitled to receive the same, then, and in every such case, the holder of such note, bill, or obligation, shall respectively be entitled to receive and recover interest on the same, until the same shall be fully paid and satisfied, at the rate of ten per cent per annum, together with the lawful interest thereon, from the time of such demand as aforesaid.

SEC. 8. *And be it further enacted*, That the following rules, regulations, limitations and provisions, shall form and be the fundamental articles of the said corporation:

RULE I. The number of votes to which each stockholder shall be entitled, shall be according to the provisions of the 7th section of the Act of which this is an amendment.

II. The Cashier and other officers of the banking department of said corporation (the President excepted), shall, before they enter upon the duties of their offices respectively, give bond for the faithful performance of their duties, with such security as may be required by the Board of Directors.

III. The total amount of debts which the said corporation shall, at any time, owe, whether by bill, bond, note, or other contract, shall not exceed three times the amount of capital stock actually paid in, and set apart for banking purposes.

IV. Dividends of the net profits of the stock used in banking purposes, or of so much thereof as may be prudent, shall be declared and paid half yearly, if the condition of the Company warrant it, until the Road shall yield a profit, when and in which case, that profit may also in like manner be divided; and such dividend shall, from time to time, be determined by a majority of Directors, at a meeting to be held for that purpose, and shall, in no case, exceed the amount of the net profits actually acquired by the corporation, so that the capital stock thereof shall never be impaired.

V. The Directors shall cause to be kept fair and regular entries in a book to be provided for that purpose, of their proceedings; and on any question, when any one Director shall require it, the yeas and nays of the Directors voting shall be recorded in such book, and the minutes be at all times, on demand, produced to the stockholders, at their general meeting.

VI. So soon as fifty per cent. of the stock already subscribed, and of the stock which may hereafter be taken in the said Company, shall have been paid in, the Company shall have the power and privilege, and not till then, of commencing banking operations, and for that purpose shall have the power to prepare and issue notes, signed by the President and countersigned by the Cashier, as in the usual course of banks in such cases: *Provided*, That of the sum so received, one-half shall be set apart for their said banking operations, and the other half to

the building of the Road, and so on in the like ratio as to all further instalments which may thereafter be called in.

VII. That portion of the capital stock hereinbefore provided for, and set apart for the purpose of building the Road, shall in no wise be diverted from that object, except as provided for in the second section of this Act.

SEC. 9. *And be it further enacted*, That the President and Directors of the Company shall be elected annually, as provided for in the Act to which this is an amendment; and the Board of Directors of the said corporation shall have power to appoint a Cashier and such other officers as may be necessary for the transaction of the banking business herein provided for, and to allow them reasonable compensation for their services; and shall be capable of exercising all such powers and authorities for the well governing and ordering of the affairs of said corporation as to them shall seem best calculated to promote the best interest of the Company.

SEC. 10. *And be it further enacted*, That the principal office of said Company shall be located at Athens, and all elections and meetings of the stockholders shall be held at such principal office, except when otherwise ordered by the Directors on special occasions.

SEC. 11. *And be it further enacted*, That the Union Railroad, as authorized by the first section of the Act to which this is an amendment, shall be completed within four years from the passage of this Act; and the Branch to Athens, and one of the southern Branches through Greensborough, which shall be designated by a vote of the stockholders, shall be completed within six years after the passage of this Act; and on failure thereof, the banking privileges hereby granted shall be thenceforth forfeited, and all banking operations shall thenceforward, in such event, be made to cease and determine.

SEC. 12. *And be it further enacted*, That the banking privileges hereby granted shall be and continue for and during

the term of twenty-five years, to be computed from the time fixed by this Act for the completion of the Union Road.

SEC. 13. *And be it further enacted*, That the Act to which this is an amendment shall be and remain in full force and effect, in every section and clause thereof, except where it conflicts with the provisions of this Act.

SEC. 14. *And be it further enacted*, That all the acts done and contracts made by the Georgia Railroad Company are hereby declared to be of binding efficacy on the Georgia Railroad and Banking Company; and all the rights to property acquired by the Georgia Railroad Company, of whatsoever nature or kind the same may be, shall pass to and be vested in the Georgia Railroad and Banking Company as fully and completely as they were vested in the said Georgia Railroad Company.

SEC. 15. *And be it further enacted*, That the persons and property of the stockholders for the time being, of the said Georgia Railroad and Banking Company, shall be pledged and bound in proportion to the amount of shares held by each, for the ultimate redemption of the bills or notes issued by and from said Company, in the same manner as in common commercial cases or simple actions of debt.

SEC. 16. *And be it further enacted by the authority aforesaid*, That no exclusive privilege or right of road, extended to the corporation by the Act of which this is amendatory, shall prevent the State from granting a charter to any Company that may hereafter apply for a Railroad to run from Macon to the Tennessee State line; and from granting any charter or charters to construct any Road to cross said Road, at any point west of Eatonton, or Madison, or Athens.

(3) Act approved December 25, 1837, Georgia Laws 1837, p. 212.

WHEREAS, By an Act entitled "An Act to authorize the construction of a Railroad communication from the Tennessee

line, near the Tennessee river, to the point on the southeastern bank of the Chattahoochee river, mostly eligible for running branch roads, thence to Athens, Madison, Milledgeville, Forsyth and Columbus, and to appropriate monies therefor," encouragement is held out in the tenth section of said Act, for the construction of branch Railroads from the terminus of said State Railroad, on the Chattahoochee river, to the several towns of Athens, Madison, Milledgeville, Forsyth and Columbus:

AND WHEREAS, in pursuance of the views of said Act, the Monroe Railroad Company, and the Chattahoochee Railroad Companies have obtained the privilege, by acts of the Legislature, to connect their roads with said State Railroad;

Now, for the purpose of extending a like privilege to the Georgia Railroad and Banking Company, to continue their Road from the town of Madison, to pass through or near the town of Covington, to the said State Railroad, on the Chattahoochee river:

SEC. 1. *Be it enacted, etc.*, That the said Georgia Railroad and Banking Company shall have the right, and they are hereby authorized and empowered to continue their Railroad from the town of Madison, in Morgan County, to pass through or near Covington, in the County of Newton, to connect with and join the Railroad, about to be constructed by the State, from the Tennessee line, near the Tennessee river, to the southeast bank of the Chattahoochee river, as contemplated by the Act recited in the foregoing preamble, and for that purpose the said Georgia Railroad and Banking Company shall have all the powers and privileges, rights and immunities in the construction of said branch from Madison, as aforesaid, to the said State Railroad, as are contained in the several acts heretofore passed, and now of force, constituting the charter of the Georgia Railroad and Banking Company, as fully as if the said continuation had been originally a part of the Georgia Railroad, and the said acts shall extend to and regulate the construction of said extended road, hereby authorized to be constructed, in the same

manner, and to the same extent, and for the same purposes and uses, as the same have been used and applied to the Georgia Railroad and its branch from the city of Augusta to the said town of Madison.

(4) Act approved December 20, 1849, Georgia Laws 1849, p. 239.

SEC. 1. *Be it enacted by the Senate and House of Representatives of the State of Georgia in General Assembly met, and it is hereby enacted by the authority of the same,* That the Georgia Railroad and Banking Company shall be allowed to increase their capital to a sum not exceeding five million dollars, upon such terms, limitations and conditions as the stockholders thereof, in Convention, shall determine: *Provided, always,* that the banking capital of said Company shall not be increased beyond the amount now authorized by their charter, namely, one million of dollars.

* * *

SEC. 3. *And be it further enacted,* That the power heretofore granted to the Georgia Railroad and Banking Company of constructing a branch of their road to Washington, in the County of Wilkes, be and the same is hereby revived and authorized to be exercised by said Company: *Provided,* That the amount of the increased stock of said Company shall not be exempted from taxation, as is secured to the present stock by the latter clause of the 15th section of the charter of said Company, but shall be subject to such tax as the Legislature may hereafter impose.

(5) Act approved December 11, 1858, Georgia Laws 1858, p. 66.

SEC. 1. *Be it enacted,* That the Georgia Railroad and Banking Company be and they are hereby authorized and empowered to extend the Eatonton Branch of their road either from

Greensboro or Madison, or from any point between those places, to the town of Eatonton, and to increase the capital stock of said Company to an amount sufficient for that purpose, with all the powers and privileges, rights and immunities contained in the existing charter: *Provided*, nothing herein contained shall be construed to authorize said Company to make any increase of its banking capital: *And provided also*, that such additional stock as shall be allowed under this Act shall be subject to such rate of taxation as the Legislature may from time to time assess, either directly or through the Executive of the State, such rate of taxation never to exceed that put upon the property of the people of this State, and this reserved right to tax the additional stock authorized under this Act in no case nor under any circumstances to be construed to authorize any increase of rate of taxation upon any other stock or property connected with said Company other than the additional stock allowed by this Act.

(6) Act approved October 5, 1868, Georgia Laws 1868, p. 147.

WHEREAS, In the original charter of said Georgia Railroad and Banking Company (then known as the Georgia Railroad Company), it is provided that said Company shall have the power to continue the Athens Branch towards any point which may be agreed upon on the Tennessee river, and by the amended charter of said Company, passed in December, 1835, it is provided that the continuation of said Road beyond Athens, so as to connect with the Cincinnati Road, shall be steadily prosecuted so soon as the Company shall have satisfactory evidence that the said connection can be formed: And whereas, reasonable hopes are now entertained that said Cincinnati Road will be finished to the town of Clayton at no distant day:

SEC. 1. *Be it, therefore, enacted by the Legislature of the State of Georgia, in General Assembly met*, That the Georgia Railroad and Banking Company have the power to extend their Road from or near the city of Athens to the town of Clayton, in Rabun County, and for that purpose the said Company shall

have and enjoy all the powers and privileges of the original charter and amendments.

SEC. 2. For the purposes stated in the above section, the said Company may increase its capital to such forms and upon such terms as the Board of Directors may determine: *Provided*, said increase shall not exceed two million dollars.

II. Laws providing for the taxation of railroads and remedies of taxpayer.

(1) Act approved February 1, 1850, Georgia Laws 1849, p. 378.

AN ACT—*Supplementary to the General Tax Laws, and to Tax Certain Property therein mentioned which has been heretofore Exempted from Taxation.*

SEC. 1. *Be it enacted by the Senate and House of Representatives of the State of Georgia, in General Assembly met*, That the President of the Georgia Railroad shall, on or before the thirty-first day of December, 1850, pay into the Treasury of this State, as a tax for the year 1850, on oath, one-half of one per cent. on the next annual income of the stock of said Road and its branches, under the penalty of double tax for his refusal or neglect to do so, to be collected by execution to be issued by the Treasurer.

SEC. 2. *And be it further enacted*, That the increase of capital of the Georgia Railroad and Banking Company, authorized by the Act of the present session of the General Assembly, be and the same is hereby taxed thirty-one and a quarter cents on every hundred dollars worth.

* * *

SEC. 5. *And be it further enacted*, That each and every of the Presidents of the aforesaid Railroad Companies shall make like payments on the thirty-first day of December in each and every year hereafter, until this Act shall be repealed: *Provided*,

That no banking capital employed by the Georgia Railroad and Banking Company, and the Central Railroad and Banking Company, shall, by any construction of this Act, be exempt from future taxation, at the discretion of the Legisltaure, and the tax on net profits only be on the net profits of the Railroad.

(2) Act approved February 28, 1874, Georgia Laws, p. 107, as amended and now codified in Code Sections 92-2602, 92-2603, and 92-2604.

"92-2602. (1032) Presidents to make returns.—The presidents of all the railroad companies, including street railroads, dummy railroads, and electric railroads in this State shall be required to return on oath, annually, to the Comptroller General, the value of the property of their respective companies, without deducting their indebtedness; each class or species of property to be separately named and valued, so far as the same may be practicable, to be taxed as other property of the people of the State; and said returns shall be made under the same regulations provided by law for the returns of officers of other incorporated companies, which are required by law to be made to the Comptroller General: Provided, that the said railroads shall be taxable for city purposes as other property is taxed for city purposes, and any law making railroad companies taxable by counties will be applicable, to street railroad companies of every character. (Acts 1874, p. 107; 1889, p. 36.)

"92-2603. (1033) Presidents to pay taxes assessed.—Said presidents shall pay to the Comptroller General the taxes assessed upon the property of said railroad companies; and on failure to make the returns required by the preceding section, or on failure to pay the taxes so assessed, the Comptroller General shall proceed to enforce the collection of the same in the manner provided by law for the enforcement of taxes against other incorporated companies. (Acts 1874, p. 107.)

"92-2604. (1034) Illegality to resist tax; venue.—If any railroad company affected by the preceding sections desires to resist the collection of the tax therein provided for, said company through its proper officer may, after making the

return required in section 92-2602, and after paying the tax levied on such corporation and continuing to pay the same while the question of its liability herein is undetermined, resist the collection of the tax above provided for, by filing an affidavit of illegality to the execution or other process issued by the Comptroller General, stating fully and distinctly the grounds of resistance, which shall be returnable to the superior court of Fulton County, to be there determined as other illegalities; the same to have precedence of all cases in said court as to time of hearing, and with the same right of motions for new trial and writs of error as in other cases of illegality, in which case the Comptroller General shall be represented by the Attorney General of the State. If the grounds of such illegality are not sustained, the Comptroller General shall, after crediting the process aforesaid with the amount paid, proceed to collect the residue due under the provisions aforesaid; and if, at any time during the pendency of any litigation herein provided for, the said corporation shall fail to pay the tax required to be paid as a condition of hearing, said illegality shall be dismissed, and no second affidavit of illegality shall be allowed. Said illegality may be amended as other affidavits of illegality, and shall always be accompanied by good bond and security for the payment of the tax execution issued by the Comptroller General. (Acts 1874, p. 107; 1931, pp. 7, 38.)"

(3) Act approved February 22, 1877, Georgia Laws 1877, p. 126, as amended and as now codified in Sections 92-5904, 92-6001 and 92-6002 of the Georgia Code of 1933.

"92-5904. (1050) Returns to be itemized.—When corporations, companies, persons or agencies are required by law to make returns of property, or gross receipts, or business, or income, gross, annual, net, or any other kind, or any other return, to the Comptroller General for taxation, such return shall contain an itemized statement of property, each class or species to be separately named and valued, or an itemized account of gross receipts, or business, or income as above

defined, or other matters required to be returned, and in case of net income only, an itemized account of gross receipts and expenditures, to show how the income returned is ascertained. (Acts. 1877, p. 126; 1905, p. 68)."

"92-6001. (1050). Assessment to correct returns.—The Comptroller general shall carefully scrutinize the returns made to him, and if in his judgment the property embraced therein is returned below its value, or the return is false in any particular, or in any wise contrary to law, he shall within 60 days thereafter correct the same and assess the value, from any information he can obtain. (Acts 1877, p. 126; 1905, p. 68)."

"92-6002. (1045, 1050). Arbitration of assessments to correct returns.—In all cases of assessment or correction of returns, as provided in section 92-6001, the officer or person making such returns shall receive notice and, if dissatisfied with the assessment or correction of returns, shall have the privilege, within 20 days after such notice, to refer the question of the true value or amount to arbitrators—one chosen by himself and one by the Comptroller General—who, in case of disagreement, may choose an umpire. If the two arbitrators, disagreeing, fail to select an umpire within 30 days after receiving notice of their appointment, the Governor shall appoint two arbitrators, who, with the arbitrator selected by the officer or person making the returns, shall determine the question as to the amount of value. Every arbitrator or umpire chosen hereunder shall be a citizen of Georgia. The award shall be made within 30 days from the appointment of the umpire or, in case no umpire is chosen, within 30 days from the appointment of arbitrators by the Governor; and their award shall be final. (Acts 1877, p. 126; 1878-9, p. 166; 1905, p. 68.)".

(4) Act approved October 16, 1889, Georgia Laws 1889, p. 29, now codified in Code Sections 92-2701, 92-2702, 92-3703, 92-2704, 92-2705, 92-2706.

"92-2701. (1036) Railroads to report to Comptroller General annually.—On or before the first day of March each railroad

company in this State shall make an annual return as of January first preceding to the Comptroller General, for the purposes of county taxation in each of the counties through which said road runs, in the following manner: Said return shall be under the oath of the president or other chief executive officer, and shall show the following facts as they existed on the first day of January preceding, to wit: first, the aggregate value of the whole property of said railroad company; second, the value of the real estate and track-bed of said company; third the value of the rolling stock and all other personal property of said company; fourth, the value of the company's property in each county through which it runs. (Acts 1889, p. 29; Const., Art. VII, Sec. II, Par. VI (§2-5007).)

"92-2702. (1037) Taxation by each county through which railroad passes.—Whenever the amount of the tax levy of any county through which the said railroad runs is assessed by the authority of such county, the ordinary or other authority having charge of county affairs shall certify the same and transmit the certificate to the Comptroller General; and the property of such railroad company shall be subject to taxation in each county through which the road passes, to the same extent and in the same manner that all other property is taxed, in the manner hereafter set out. (Acts 1889, p. 29.)

"92-2703. (1038) Property assessed.—Whenever such certificate is received by the Comptroller General, he shall proceed to assess the amount of each railroad company's property, in each of said counties, in the following manner: First, it shall be assessed upon the property located in each county, upon the basis of the value given by the returns. Second, the amount of tax to be assessed upon the rolling stock and other personal property is as follows: As the value of the property located in the particular county is to the value of the whole property, real and personal, of the said company, such shall be the amount of rolling stock and other personal property to be distributed for taxing purposes to such county. The value of the property located in the county and the share of the rolling

stock and personal property thus ascertained, and apportioned to each of such counties, shall be the amount to be taxed to the extent of the assessment in each county. (Acts 1889, p. 29.)

"92-2704. (1039) Taxes due county paid tax collector.—Whenever the Comptroller General shall ascertain and levy in the manner specified the amount of tax due by such company to each of such counties, it shall be his duty at once to notify the president and treasurer of such railroad company of the amount due in each of said counties for county taxes of said railroads, and each and every road is required, on or before December 20th in each year, to pay to the tax collector of each county through which the railroad runs the amount stated by the Comptroller General as the tax due to such county. (Acts 1889, p. 29; 1917, p. 195.)

"92-2705. (1040) Manner of issuing executions.—If any railroad company shall refuse to pay the amount thus ascertained and due by it to the tax collector of any county to which the same is due and payable, it shall be the duty of the Comptroller General to issue and execution in the name of the State against such railroad company for the same, to be issued, levied, and return in the same manner as tax executions are issued for State taxes due in the State by said companies. (Acts 1889, p. 29.)

"92-2706. (1041) Affidavit of illegality to resist tax.—If any railroad company desires to dispute its liability to such county tax, it may do so by an affidavit of illegality, to be made by the president of said railroad or other officer thereof having knowledge of the facts in the same manner as other affidavits of illegality are made, and shall be returned for trial to the superior court of the county where such tax is claimed to be owing and where it is sought to be collected, where such cases shall be given precedence for trial over all other cases, except tax cases in which the State shall be a party. (Acts 1889, p. 29; 1916, p. 34; 1927, p. 136.)"

(5) Act approved December 24, 1890, Georgia Laws 1890-1891, p. 152, codified in Code Sections 92-2801, 92-2802, and 92-2804.

"92-2801. (872) Property of railroads subject to municipal taxation.—All property, real and personal, belonging to railroad companies in this State, which is within the limits of any municipality as fully and as completely as is the property of other corporations within the limits, and it is the duty of the municipal authorities to cause property belonging to a railroad company to pay its proper and just share of municipal taxes. (Acts 1890-1, p. 152.)

"92-2802. (873) Return to show what.—In addition to the facts required to be shown by Chapter 92-27, providing a system of railroad property taxation in each of the counties, every railroad company in this State shall, at the time of making the returns provided for in said Chapter, show the value of the company's property in each incorporated city or town through which it runs. (Acts 1890-1, p. 152.)

. . .

"92-2804. (875) County tax law applicable.—All other provisions of Chapter 92-27 are made applicable to the assessment and collection of taxes by municipalities upon the property of railroads located in such municipalities, and upon the rolling stock and other personal property. (Acts 1890-1, p. 152.)"

(6) Act approved August 14, 1908, now codified in Sec. 92-6005, Code of 1933.

"92-6005 (1054) Returns of railroad companies for county, municipal, and school tax purposes.—The returns of railroad companies for purposes of county and municipal and school taxation shall be subject to the same inspection, objection and assessment by the Comptroller General, and arbitration, as is provided by law for returns of such property for purposes of State taxation (Acts 1908, p. 24)."

(7) Act approved July 31, 1918, now codified in Chapter 92-61 of the Code of 1933.

"92-6101. Undervaluation of property or failure to return. —When the owner of property has omitted to return the same for taxation at the time and for the years the return should have been made, or, having returned his property or part of same, has grossly undervalued the property returned or his property has been assessed for taxation at a figure grossly below its true value, such owner, or, if dead, his personal representative or representatives, shall return the property for taxation for each year he is delinquent, whether delinquency results from failure to return or from gross undervaluation, either by the delinquent or by assessors, said return to be made under the same laws, rules and regulations as existed during the year of said default, or the year in which said property was returned or assessed for taxation at figures grossly below its true value: Provided, that no lien for such taxes shall be enforced against any specific property which has been previously alienated or incumbered, and is in the hands of innocent holders without notice. (Acts 1918, p. 232.)

"92-6102. Notice and demand by Comptroller to file return. —When the owner of said property, or, if dead, his personal representative or representatives, refuses or fails to make returns in cases of property which should have been returned to the Comptroller General, the Comptroller General shall notify, in writing, such owner or his personal representative or representatives of his delinquency, demanding that a return shall be made thereof within 20 days. (Acts 1918, p. 233.)

"92-6103. (1136) Assessment of value by Comptroller; issue of excessiveness.—If the delinquent or his personal representative or representatives, as provided for in section 92-6102, refuses or fails to return such property after the notice given, or returns it below what the Comptroller General deems its value, the Comptroller General shall assess such property for taxation for State, county, or municipal and school purposes, from the best information he can obtain as to its value, for the

current year, and for each year in default, and notify such delinquent or his personal representative or representatives of the valuation, which valuation shall be final, unless the person or persons so notified shall raise the question that it is excessive, in which event the further procedure shall be as provided by section 92-6001. (Acts. 1918, p. 233.)

"92-6104. Issue of taxability, where tried.—If the delinquent under section 92-6102 disputes the taxability of such property, he may raise the question by petition in equity in the superior court of Fulton county, and if such delinquent is dead, his personal representative or representatives shall have the same right. (Acts. 1918, p. 234.)"

(8) Act approved August 25, 1927, Georgia Laws 1927, p. 97, now codified in Sec. 92-5902 of the Code of 1933.

"92-5902. Returns by public utilities made to whom.—All persons or companies owning or operating railroads . . . shall be required to make annual tax returns of all property located in this State to the Comptroller General; and the laws now in force providing for taxation of railroads in this State shall be applicable to the assessment of taxes on the businesses above stated."

(9) Act approved March 30, 1937, Georgia Laws 1937, p. 497, codified in Sec. 92-5811 of the Code of 1933.

"92-5811. Unreturned and undervalued personal property to be assessed.—Where the owner of such property has omitted to return such property for taxation at the time and for the year that return should have been made, or, having returned such property, has grossly undervalued same, the Commission through its deputies or agents shall require such delinquent or defaulting taxpayer to make a proper return, or return the omitted property, and the same shall be assessed in the manner and method prescribed in Chapter 92-61. (Acts 1937, p. 497.)"

(10) Reorganization Act approved January 3, 1938, Georgia Laws Extra Session 1937-1938, p. 77.

"Section 4. The State Revenue Commissioner . . . is hereby vested with all the powers and authority and required to perform all the duties relating to matters of petroleum inspection, taxation and licenses heretofore vested in the Comptroller General (except licenses to insurance companies and their agents) and he is also vested with all the powers and authority and required to perform all the duties relating to taxation and licenses heretofore vested in any state administrative officer or State Department, but the powers and authorities by this section vested in the State Revenue Commissioner shall be the powers and authorities of said officers as modified, limited and enlarged by this Act."

(Sections 18 through 23 create a Board of Tax Appeals and provide for its procedure.)

"Section 24. Repeal of Certain Code Sections.—The following provision of Title 92 ("Public Revenue") of the Georgia Code of 1933 are hereby repealed. Sections 92-6001-92-6007, inclusive, relating to arbitration of assessments or correction of returns made by the Comptroller General, and 92-7004-92-7006, inclusive, relating to arbitration of State Revenue Commission's equalization of County assessments.

. . .

"Section 34. Refunds.

. . .

"(b) Procedure for Granting. In any case in which it shall be determined that an erroneous or illegal collection of tax or license has been made by the Commissioner, the taxpayer from whom such tax or license was collected may file a claim for refund with the said Commissioner in writing and in such form and containing such information as the Commissioner may require, to include a summary statement of the grounds upon which the taxpayer relies. In the event the taxpayer desires a

conference or hearing before the Commissioner in connection with any claim for refund, he shall so specify in writing in the claim, and if the claim conforms with the requirements of this section the said Commissioner shall grant such a conference at a time he shall specify. The Commissioner shall consider information contained in taxpayer's claims for refund and such other information as may be available and shall approve or disapprove the taxpayer's claim and notify such taxpayer of his action. In the event any claim for refund is approved, the Commissioner shall forthwith proceed under subsection (a) of this section to give effect to the terms thereof. Provided, further, that the taxpayer whose claim for refund is denied by the Commissioner under the terms of this Act, shall have the right to sue for refund in the Superior Court of the County in which said taxpayer would have a right to appeal from a judgment by the Board of Tax Appeals, as in this Act, provided.

"Section 44. Appeal from the Commissioner's Findings. The Commissioner's assessment shall not be reviewed except by the procedure hereinafter provided; no trial court shall have jurisdiction of proceedings to question such assessments except as in this Act provided. If any taxpayer shall be aggrieved by any assessment which the Commissioner may make, he may within thirty (30) days from the date when the assessment is finally made and notice thereof given to the taxpayer file with the Board of Tax Appeals a petition for review. The request for review may be accompanied by a copy of the taxpayer's return as filed with the Commissioner and of any special accounting or other report thereon which the Commissioner may have made or required to be made. Both the Commissioner and the taxpayer shall have the right to introduce before the Board of Tax Appeals any evidence or data which said Board may rule to be pertinent or relevant, whether it was introduced originally before the Commissioner or not. The filing of any such petition shall not abate penalties for nonpayment unless such appeal is finally decided in favor of

the taxpayer, nor shall it stay the right of the Commissioner to collect the tax which is admitted to be due, by any methods available to him under the law, unless the taxpayer shall furnish security of a kind and in amount satisfactory to the Commissioner. Where the Commissioner is required by law to certify to any county or municipal government of this State all or any part of an assessment or tax against any taxpayer, and the taxpayer disputes the correctness of said assessment or tax as determined by the Commissioner, the Commissioner is hereby directed to certify to said county and municipal government the value of the property of the taxpayer and/or the tax admitted by him in his return to be due, and after a final determination of the balance of said assessment or tax in dispute shall make a supplemental certification to said counties and municipal governments as may be finally determined. It shall be the duty of the taxpayer to pay, as required by law, any taxes that may be assessed by the State, county or municipal governments, both upon the original value as shown in his return as well as upon its supplemental value that may finally be determined as in this Act provided.

"Section 45. Review of Board's decisions. Jurisdiction of the Superior Courts. The findings of the Board of Tax Appeals shall not be final; but either party may appeal from any order, ruling, or finding of the said Board to the Superior Court of the county of the residence of the taxpayer unless the taxpayer be a railroad or other public service corporation or non-resident, in which event the appeal of either party shall be to the Superior Court of the County in which is located its principal place of doing business, or in which the chief or highest corporate officer, resident in the State, maintains his office. The appeal and necessary records shall be certified and transmitted by the Chairman of the Board and shall be filed with the Clerk of the Superior Court within thirty (30) days from the date of judgment by the Board. The procedure provided by law for applying for and granting appeal from the Court of Ordinary to the Superior Court shall apply as far as suitable to the appeal authorized herein, except that the appeal authorized

herein may be filed within fifteen (15) days from the date of judgment by the Board.

"Before the Superior Court shall have jurisdiction to entertain such appeal filed by any aggrieved taxpayer, such taxpayer shall file with the Clerk of the Superior Court a writing whereby such taxpayer shall agree to pay on the date or dates the same shall become due all taxes for which such taxpayer has admitted liability and shall within thirty (30) days from the date of judgment by the Board file with the Clerk of the Superior Court, except where appellant owns real property in Georgia, the value of which is in excess of the amount of the tax in dispute, a bond in amount satisfactory to such Clerk or other security in amount satisfactory to such Clerk conditioned to pay any tax over and above that which the taxpayer has admitted liability for which shall be found to be due by a final judgment of court, together with interest and costs. It shall be ground for dismissal of the appeal if the taxpayer fails to pay all taxes admittedly owed upon the due date or dates as now or hereafter provided by law.

"If the final judgment of court places upon the taxpayer any tax liability which he has not already paid, he shall pay the same on the due date or dates now or hereafter fixed by law if the tax or any of same has not become due on the date of said final judgment of court. And if the tax or any of same has already become due at the time of final judgment of court, the taxpayer shall immediately pay the tax or so much thereof as has already become due, with interest, and shall pay the court costs, in the event the final judgment of court is adverse to the taxpayer, no matter whether the tax or any part of same has or has not become due at the time of said final judgment of court."

(11) Act approved February 17, 1943, Georgia Laws 1943, p. 204.

"Section 2. That said Act of January 3, 1938, be, and the same is hereby further amended by striking and repealing all

Sections 18, 19, 20, 21, 22, 23 and 24 of Chapter III thereof, which said sections create a State Board of Tax Appeals, and provide for the review of decisions of the State Revenue Commissioner, and substituting in lieu thereof new sections to be numbered section 18, section 19, and section 20, which shall read as follows:

" 'Section 18. Except as otherwise provided by this Act, all matters, cases, claims and controveries, of whatsoever nature arising in the administration of the revenue laws, or in the exercise of the jurisdiction of the State Revenue Commissioner or the Department of Revenue, as conferred by this act, shall be for determination by the State Revenue Commissioner, subject to review by the courts as provided for by Section 45 of Chapter IV of this Act. The effect of this section shall be that, except as hereinafter provided, all final rulings, orders and judgments of the State Revenue Commissioner shall be subject to appeal and review under Section 45 of this act in the same manner, under the same procedure, and as fully, as if same had been considered and passed upon by the Board of Tax Appeals. Any such appeal from a final ruling, order, or judgment of the State Revenue Commissioner shall be entered within the time prescribed by Section 45 of the Act; Provided, however, that nothing herein contained, and no provision of this Act, shall be construed to deprive a taxpayer against whom an execution for taxes has been issued under an assessment by the State Revenue Commissioner of the right to resist enforcement of the same by affidavit of illegality.

" 'All petitions for review filed and now pending before the Board of Tax Appeals shall be and they are hereby declared to be in the same position as if the ruling, order, finding or assessment of the Commissioner therein complained of and sought to be reviewed had been affirmed by the Board of Tax Appeals; and all such rulings, orders, findings or assessments now pending for review before the Board of Tax Appeals shall be final and conclusive unless the taxpayer who filed said petition for review shall, within thirty (30) days from the date of the passage of this Act, appeal said ruling, order, finding or assess-

ment to the Superior Court in the manner provided by Code Section 92-8446, except that in the case of a foreign corporation domesticated in Georgia the appeal shall be made within the time herein prescribed to the Superior Court of the County in which such foreign corporation was domesticated in Georgia.'

"'Section 19. The provisions of the foregoing section with reference to reviewing assessments of the State Revenue Commission shall not apply to assessments for ad valorem taxation against any person, corporation or company which was required by Chapter 92-59 of the Code of 1933 to return his or its property for ad valorem taxation to the Comptroller General and is now required by such chapter and this Act of January 3, 1938, to make such returns to the State Revenue Commissioner. The State Revenue Commissioner shall carefully scrutinize such returns made to him, and if in his judgment the property embraced therein is returned below its value or the return is false in any particular, or in any wise contrary to law, he shall, within sixty days thereafter, correct the same and assess the value, from any information available. If any such person, corporation or company shall be dissatisfied with the assessment or correction of such returns as made by the State Revenue Commissioner or the Department of Revenue, such taxpayer shall have the privilege, within twenty days after notice of such assessment and correction, to refer the question of true value or amount to arbitrators as provided for by Chapter 92-60 of the Code of Georgia of 1933. Such arbitrators shall consist of one chosen by the taxpayer and one chosen by the Governor. If the arbitrators thus chosen shall be in disagreement, they shall choose an umpire. If such arbitrators disagree and fail to select an umpire within thirty days after receiving notice of their appointment, the Chief Justice of the Supreme Court of Georgia shall select an umpire. Every arbitrator or umpire chosen hereunder shall be a citizen of Georgia. The award shall be made by the arbitrators or by the arbitrators and the umpire, as the case may be, within thirty days from the appointment or selection of such umpire. The decision and award of the arbitrators or of the arbitrators and

the umpire shall be subject to appeal and review in the same manner as decisions and orders of the State Board of Tax Appeals were subject to appeal and review under the terms of Section 45 of This Act.'

"'Section 20. Sections 92-7004 to 92-7006 of the Code of Georgia of 1933, which relate to arbitration of State Revenue Commission's equalization of county assessments are hereby repealed. Chapter 92-60 (Section 92-6001 to 92-6007) of the Code of Georgia of 1933, as modified by the provisions of the foregoing Section 19, shall continue and remain in full force and effect as if fully set forth herein.'

"Section 3. All laws and parts of laws in conflict with this Act are hereby repealed.

III. Constitution provision attempting to revoke tax exemptions.

(1) Article I, Section 3, Paragraph II of the Constitution of Georgia as amended in 1945, Georgia Laws 1945, p. 14.

"Paragraph II. Revocation of tax exemptions. All exemptions from taxation heretofore granted in corporate charters are declared to be henceforth null and void."

IV. Constitutional and statutory provision authorizing Attorney General to represent State in prior litigation, as set out in Georgia Code of 1895.

(1) Constitution of Georgia of 1877, Article VII, Section 10, Paragraph II, Code Sec. 5860(a).

"Section 5860(a).

"It shall be the duty of the attorney-general to act as the legal adviser of the Executive Department, to represent the

State in the Supreme Court in all capital felonies, and in all civil and criminal cases in any court when required by the Governor, and to perform such other services as shall be required of him by law."

(2) Code provisions. Georgia Code of 1895.

"Sec. 23. When any suit is instituted against the State, *or against any person, in the result of which the State has an interest*, under pretense of any claim inconsistent with its sovereignty, jurisdiction or rights, the Governor shall, in his discretion, provide for the defense of such suit, unless otherwise specially provided for."

"Section 220. It shall be the duty of the Attorney-General . . . to represent the State . . . in all civil and criminal cases in any court when required by the Governor."

"Sec. 123. He (the Governor) shall have general supervision over all property of the State, with power to make all necessary regulations for the protection thereof, when not otherwise provided for."

"Sec. 126. Whenever the Governor, after consulting with the attorney-general, or without, if there is no such officer, shall deem it proper to institute a suit for the recovery of a debt due the State or money or property belonging to the State, he is authorized and required to institute such suit in the proper court of this State, with the same rights as any citizen, and to require the aid of the attorney-general to begin and carry on such suits where practicable, and if not, some other suitable and competent attorney, on such terms, as to compensation, as he may agree upon, but the fees of such attorney shall be conditional."

Sec. 137. Whenever the Governor has trustworthy information that the State Treasurer or comptroller-general is insane, or has absconded or grossly neglects his duties, or is guilty of conduct plainly violative of his duties, or demeans himself in office to the hazard of the public funds or credit of the

State, the Governor shall suspend said treasurer, or comptroller-general, as the case may be, and report his reasons for such suspension to the General Assembly. Said suspension shall continue until the General Assembly shall otherwise direct."

"Sec. 139. The Governor may suspend the collection of the taxes, or any part thereof, due the State, until the meeting of the next General Assembly, but no longer; nor shall he otherwise interfere with the collection thereof."

"Sec. 222. It is in the discretion of the Comptroller General to require the Attorney General, when the services of a Solicitor General are necessary in collecting or securing any claim of the State, in any part of the State; either to command the services of said Attorney General in any and all such cases, or the Solicitor Generals in their respective circuits."